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Kong Kin Lay & Ors v Kong Kin Siong & Ors

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(W)-290–02 OF 2023
SUPANG LIAN, AZIMAH OMAR AND WONG KIAN KHEONG JJCA
31 AUGUST 2025

C *Evidence — Adverse inference — Failure to adduce certain evidence — Failure to adduce material evidence — Failure to call expert witness to testify on testamentary capacity — Whether adverse inference ought to be invoked — Evidence Act 1950 s 114(g)*

D *Evidence — Witness — Credibility of — Credibility of witness who prepared and witnessed the execution of will — Whether witness credible*

E *Succession — Will — Validity — Will made by a 97-year-old man — High Court held that will was valid — Testamentary capacity of deceased — Test to determine testamentary capacity — Whether there was real doubt regarding deceased's testamentary capacity — Whether 'golden rule' in Simpson, Re, Schaniel v Simpson (1977) 121 Sol Jo 224 should have been followed — Whether High*
F *Court's factual finding that deceased had testamentary capacity to sign will was plainly wrong — Whether High Court's factual finding that there were no suspicious circumstances regarding the making of will was plainly wrong — Whether deceased executed will under undue influence, manipulation, control and/or domination*

G

The dispute in the present appeal was in relation to the validity of a will executed on 10 May 2014 ('the will') by Mr Kong Siew Tong ('the deceased') when he was 97 years old. The parties involved were all the children of the deceased. There were two cases in the High Court which were relevant to the
H present appeal. The first case ('Suit 1019') was filed by the respondents for an order of probate of the will but this was opposed by the first appellant on the grounds that the deceased did not possess testamentary capacity to execute the will. The second case ('Suit 494') was filed by the appellants for the following orders: (a) a declaration that the will was not valid; (b) a declaration that the
I deceased had died intestate; and (c) an order to appoint the first appellant as an administrator of the deceased's estate. The respondents counterclaimed in Suit 494 for, among others, a declaration that the will was valid and an order to distribute the deceased's estate in accordance with the will. Both suits were consolidated and tried together and at the end of the trial, the High Court

found in favour of the respondents and decided that: (i) the deceased had testamentary capacity to sign the will — in this regard, the High Court found that: (1) Mr Kong Kim Leng ('SD1'), an advocate and solicitor who prepared the will, was a credible witness; (2) the expert evidence of the personal physician of the deceased ('SP2') could not prove that the deceased was suffering from dementia; and (3) the deceased was not 'insane' when he executed the will; (ii) there were no suspicious circumstances regarding the making of the will; and (iii) the deceased did not execute the will under undue influence, manipulation, control and/or domination of the respondents. Aggrieved by the High Court's decision, the appellants filed the present appeal. The main issues that arose were: (A) whether the 'golden rule' as laid down by Templeman J (as he then was) in the High Court of United Kingdom (UK) in *Simpson, Re, Schaniel v Simpson* (1977) 121 Sol Jo 224 ('golden rule (*Simpson*'s case)), should have been followed in the present case (according to the golden rule (*Simpson*'s case), the will (signed by a person advanced in age) should have been witnessed and approved by a medical practitioner who satisfies himself or herself as to the deceased's testamentary capacity and makes a record of his or her examination of the deceased's testamentary capacity); and (B) whether the golden rule (*Simpson*'s case) was a rule of case law which was binding from the view point of the doctrine of stare decisis or a rule of prudence and good practice for guidance only (so as to avoid injustice, costly and protracted litigation).

Held, allowing the appeal and setting aside the High Court's decision with costs of RM180,000 to be paid by the respondents to the first to sixth appellants, subject to allocatur fee:

(1) The test to determine testamentary capacity by Cockburn CJ in the then UK's Court of Queen's Bench in *Banks v Goodfellow* (1870) LR 5 QB 549 ('testamentary capacity test (*Banks*)'), had been adopted by our Federal Court in the cases of *Gan Yook Chin & Anor v Lee Ing Chin & Ors* [2005] 2 MLJ 1 ('Gan Yook Chin') and *Chin Jhin Thien & Anor v Chin Huat Yean @ Chin Chun Yean & Anor* [2020] 4 MLJ 581 ('Chin Jhin Thien'). The testamentary capacity test (*Banks*): (a) concerned a testator's state of mind and not the testator's physical state; (b) concerned a testator's capacity to understand and not the testator's ability to remember or recall; and (c) should be applied in relation to the particular transaction, its nature and complexity. According to *Chin Jhin Thien*, the golden rule (*Simpson*'s case) was not a rule of case law but only a rule of prudence and good practice for guidance. Further, pursuant to *Gan Yook Chin*, whether there was proof of testamentary capacity in a particular case was a question of fact. As such, cases on the existence of testamentary capacity or otherwise, could be explained on their own peculiar facts and did not constitute binding legal precedents from the view point of the doctrine of stare decisis (see para 39).

(2) The High Court's factual finding that SD1 was a credible witness was plainly wrong for the following reasons: (a) SD1 did not produce SD1's record of the deceased's oral instructions for SD1 to draft the will as evidence at the trial — such omission should attract an adverse inference against SD1 under s 114(g) of the Evidence Act 1950; (b) there was contradiction of SD1's evidence during cross-examination and re-examination regarding the deceased's alleged approval of the draft of the will; (c) the notes of evidence showed that SD1 could not remember many relevant matters regarding SD1's own role in respect of the will; (d) the learned High Court judge had admonished SD1 during cross-examination but found as a fact that SD1 was a reliable witness; (e) SD1 had changed his sworn evidence, not once but thrice, in relation to the material evidence regarding the place where the deceased signed the will; and (f) despite the fact that SD1 had 38 years of experience as an advocate and solicitor, SD1 did not send any letter to the deceased to confirm in writing that the deceased had instructed SD1 to prepare the will and that SD1 and SD2 (SD1's clerk) had attested to the execution of the will by the deceased (see para 49).

(3) The court found that SD2's testimony could not repair SD2's lack of credibility because: (a) SD2 was not present when the deceased purportedly gave oral instructions in the deceased's home for SD1 to draft the will (in April 2014); (b) SD2 did not talk to the deceased when the deceased signed the will; and (c) SD2 had no communication with the deceased before and after the execution of the will by the deceased (see para 50).

(4) The court found that at the time the deceased signed the will, there was a real doubt regarding the deceased's testamentary capacity based on the following evidence: (a) SP2's testimony regarding the deceased's forgetfulness; (b) the appellants' evidence which proved that at the end of 2010, when the deceased was 93 years old, the deceased had begun to become senile; (c) when the deceased signed the will, the deceased was at an extremely old age of 97 years old; and (d) SD1's testimony during cross-examination that the deceased was 'quite forgetful'. In view of the real doubt regarding the deceased's testamentary capacity, the golden rule (*Simpson*'s case) should have been followed with regard to the will, namely, there should have been an attesting medical practitioner who: (i) examined the deceased; (ii) was satisfied regarding the deceased's testamentary capacity; and (iii) made a record of his examination of the deceased (see para 51).

(5) The High Court's factual finding that the deceased had testamentary capacity to sign the will was plainly wrong for the following reasons: (a) SD1 was not a reliable witness; (b) SD2's testimony could not support such factual finding; (c) in view of the existence of a real doubt regarding

the deceased's testamentary capacity, the golden rule (*Simpson*'s case) should have been followed in the present case; (d) SD1's admission during cross-examination that he did not ask the deceased any question to test the deceased's testamentary capacity before the deceased signed the will; and (e) in view of the complex nature of the contents of the will, neither SD1 nor SD2 could prove the existence of the deceased's testamentary capacity in the present case (see para 52).

(6) The following events clearly supported an inference that the deceased had no testamentary capacity to execute the will: (a) the four video recordings of the deceased an its transcripts adduced by the appellants; (b) the conduct of a party was relevant under s 8(2) of the Evidence Act 1950 — in the present case, the respondents' conduct clearly proved their active concealment of the deceased's lack of testamentary capacity, inter alia, their failure to call one Dr Lim (who had examined the deceased for a total of 11 times) to give expert evidence regarding the deceased's testamentary capacity and such failure justified the invocation of adverse inference under s 114(g) of the Evidence Act 1950; and (c) there would not be any reason or necessity for the respondents to incorporate Kong Siew Tiong Property Sdn Bhd ('KSTP') to manage the deceased's assets and business if the deceased had testamentary capacity to execute the will. Considering that there was no proof of the deceased's testamentary capacity on a balance of probabilities, the respondents had to prove that the deceased knew and approved the contents of the will. However, no such proof had been adduced by the respondents in the present case (see paras 52 & 58).

(7) The High Court's factual finding that there were no suspicious circumstances regarding the making of the will was plainly wrong for the following reasons: (a) in comparison to the appellants, the will had favoured substantially the respondents, hence, the respondents had a financial motive within the meaning of s 8(1) of the Evidence Act 1950 to maintain the validity of the will; (b) the first respondent was involved in the preparation of the will from the very beginning; (c) the first respondent was present in the deceased's home when the deceased allegedly instructed SD1 to prepare the will; (d) SD1 did not produce SD1's record of the deceased's oral instructions for SD1 to draft the will as evidence at the trial; (e) the fact that the will had omitted three assets (including the deceased's interest in two business partnership and a Mercedes Benz car) aroused a suspicion that the will was not valid; and (f) the presence of the first and second respondents at the time when SD1 allegedly read and explained the will to the deceased and when the deceased signed the will would raise a suspicion that the will was not valid (see para 55).

(8) In addition, SD1 had admitted during cross-examination that SD1 did not record anywhere that SD1 had read and explained the contents of the will to the deceased and that the deceased understood SD1's explanation of the contents of the will. Further, after the execution of the will by the deceased, SD1 handed the will to the first respondent. The deceased was not given a copy of the will by the first respondent. The will was kept in a safe box situated in a room in the deceased's home and the second respondent had erected a grill gate on the door of the said room. Only the second respondent kept the key of the said safe box. The deceased had a right to revoke the will or amend the will by way of a codicil. Without a copy of the will, such right became illusory. Premised on the above evidence and reasons, the court decided that the respondents had not discharged their legal burden and evidential burden to dispel the existence of suspicious circumstances in the present case (see paras 55–56).

(9) The appellants had succeeded in discharging the legal burden and evidential burden to prove on a balance of probabilities that the deceased executed the will under the undue influence, manipulation, control and/or domination of the respondents based on the following reasons and evidence: (a) since 2009, the deceased was wheelchair-bound and the second respondent was the one who took care of the deceased and the first respondent even replaced the fourth appellant as the deceased's driver; (b) without any reason, the respondents discontinued the deceased's consultation with SP2 and brought to deceased to consult another doctor; (c) the respondents had control of the deceased's business through KSTP; (d) the respondents were able to prevent the appellants from taking the deceased to consult a geriatrics; (e) the deceased's right to revoke the will or amend the will by way of a codicil had been deprived by the first and second respondents; and (f) the respondents had surreptitiously took the deceased from the deceased's home to the third respondent's home and thereafter, the appellants were not allowed by the respondents to meet the deceased (see paras 59–60).

[Bahasa Malaysia summary

Pertikaian dalam rayuan semasa adalah berkaitan dengan keabsahan wasiat yang disempurnakan pada 10 Mei 2014 ('wasiat tersebut') oleh Encik Kong Siew Tong ('si mati') ketika beliau berumur 97 tahun. Pihak-pihak yang terlibat dalam kes semasa kesemuanya merupakan anak-anak si mati. Terdapat dua kes di Mahkamah Tinggi yang berkaitan dengan rayuan semasa. kes pertama ('Saman 1019') telah difailkan oleh responden-responden untuk perintah probet wasiat tersebut tetapi ini telah ditentang oleh perayu pertama atas alasan bahawa si mati tidak mempunyai keupayaan perwasiatan untuk menyempurnakan wasiat tersebut. kes kedua ('Saman 494') telah difailkan oleh perayu-perayu untuk perintah-perintah berikut: (a) pengisytiharan

bahawa wasiat tersebut tidak sah; (b) pengisytiharan bahawa si mati telah meninggal dunia tanpa wasiat; dan (c) perintah untuk melantik perayu pertama sebagai pentadbir harta pusaka si mati. Responden-responden membuat tuntutan balas dalam Saman 494 untuk, antara lain, pengisytiharan bahawa wasiat tersebut sah dan perintah untuk membahagikan harta pusaka si mati mengikut wasiat tersebut. Kedua-dua saman tersebut telah disatukan dan dibicarakan bersama dan pada akhir perbicaraan, Mahkamah Tinggi membuat dapatan yang memihak kepada responden-responden dan memutuskan bahawa: (i) si mati mempunyai keupayaan perwasiatan untuk menandatangani wasiat tersebut — dalam hal ini, Mahkamah Tinggi mendapati bahawa: (1) Encik Kong Kim Leng ('SD1'), peguam bela dan peguam cara yang menyediakan wasiat tersebut, adalah saksi yang boleh dipercayai; (2) keterangan pakar oleh pakar perubatan peribadi si mati ('SP2') tidak dapat membuktikan si mati menghidap demensia; dan (3) si mati tidak 'hilang akal' semasa dia menyempurnakan wasiat tersebut; (ii) tiada keadaan yang mencurigakan mengenai pembuatan wasiat tersebut; dan (iii) si mati tidak menyempurnakan wasiat tersebut di bawah pengaruh tak wajar, manipulasi, kawalan dan/atau penguasaan responden-responden. Terkilan dengan keputusan Mahkamah Tinggi, perayu-perayu memfailkan rayuan semasa. Isu-isu utama yang timbul ialah: (A) sama ada 'golden rule' seperti yang ditetapkan oleh Templeman J (pada ketika itu) di Mahkamah Tinggi United Kingdom (UK) dalam kes *Simpson, Re, Schaniel v Simpson* (1977) 121 Sol Jo 224 ('golden rule (kes *Simpson*)'), sepatutnya diikuti dalam kes semasa (mengikut golden rule (kes *Simpson*), Wasiat (yang ditandatangani oleh orang yang sudah berusia lanjut) sepatutnya disaksikan dan diluluskan oleh pengamal perubatan yang berpuas hati tentang keupayaan perwasiatan si mati dan merekodkan pemeriksaannya berhubung keupayaan perwasiatan si mati); dan (B) sama ada golden rule (kes *Simpson*) ialah peraturan undang-undang kes yang mengikat dari sudut pandangan doktrin stare decisis atau peraturan berhemat dan amalan baik untuk panduan sahaja (untuk mengelakkan ketidakadilan serta litigasi yang mahal dan berlarutan).

Diputuskan, membenarkan rayuan dan mengenepikan keputusan Mahkamah Tinggi dengan kos sebanyak RM180,000 yang perlu dibayar oleh responden-responden kepada perayu pertama hingga keenam, tertakluk kepada fi alokatur:

(1) Ujian untuk menentukan keupayaan perwasiatan yang dinyatakan oleh Cockburn CJ dalam UK's Court of Queen's Bench pada ketika itu dalam kes *Banks v Goodfellow* (1870) LR 5 QB 549 ('ujian keupayaan perwasiatan (*Banks*)'), telah diterima pakai oleh Mahkamah Persekutuan di sini dalam kes *Gan Yook Chin & Anor v Lee Ing Chin & Ors* [2005] 2 MLJ 1 ('Gan Yook Chin') dan kes *Chin Jhin Thien & Anor v Chin Huat Yean @ Chin Chun Yean & Anor* [2020] 4 MLJ 581 ('Chin Jhin Thien'). ujian keupayaan perwasiatan (*Banks*): (a) melibatkan keadaan fikiran

pewasiat dan bukan keadaan fizikal pewasiat; (b) melibatkan keupayaan pewasiat untuk memahami dan bukannya keupayaan pewasiat untuk mengingati atau mengingat semula; dan (c) hendaklah digunakan berhubung dengan transaksi tertentu, sifat dan kerumitannya. Menurut *Chin Jhin Thien*, golden rule (kes *Simpson*) bukanlah peraturan undang-undang kes tetapi hanya peraturan berhemat dan amalan yang baik untuk panduan. Selanjutnya, menurut *Gan Yook Chin*, sama ada terdapat bukti keupayaan perwasiatan dalam kes tertentu adalah persoalan fakta. Oleh yang demikian, kes-kes mengenai kewujudan keupayaan perwasiatan atau sebaliknya, boleh dijelaskan berdasarkan fakta-fakta yang tersendiri dan tidak membentuk duluan undang-undang yang mengikat dari sudut pandangan doktrin stare decisis (lihat perenggan 39).

(2) Dapatan fakta Mahkamah Tinggi bahawa SD1 ialah saksi yang boleh dipercayai adalah jelas salah atas sebab-sebab berikut: (a) SD1 tidak mengemukakan rekod SD1 tentang arahan lisan si mati untuk SD1 mendraf wasiat tersebut sebagai keterangan dalam perbicaraan — peninggalan tersebut harus menarik inferens bertentangan terhadap SD1 di bawah s 114(g) Akta Keterangan 1950; (b) terdapat percanggahan keterangan SD1 semasa pemeriksaan balas dan pemeriksaan semula berhubung dakwaan kelulusan oleh si mati ke atas draf wasiat tersebut; (c) nota keterangan menunjukkan bahawa SD1 tidak dapat mengingati banyak perkara yang berkaitan berhubung peranan SD1 sendiri dengan wasiat tersebut; (d) hakim Mahkamah Tinggi yang bijaksana telah menegur SD1 semasa pemeriksaan balas tetapi mendapati sebagai fakta bahawa SD1 ialah saksi yang boleh dipercayai; (e) SD1 telah menukar keterangan bersumpahnya, bukan sekali tetapi tiga kali, berhubung dengan keterangan material berkenaan tempat di mana si mati menandatangani wasiat tersebut; dan (f) walaupun SD1 mempunyai pengalaman selama 38 tahun sebagai peguam bela dan peguam cara, SD1 tidak menghantar apa-apa surat kepada si mati untuk mengesahkan secara bertulis bahawa si mati telah mengarahkan SD1 untuk menyediakan wasiat tersebut dan SD1 dan SD2 (kerani SD1) telah menyaksikan penyempurnaan wasiat tersebut oleh si mati (lihat perenggan 49).

(3) Mahkamah mendapati bahawa keterangan SD2 tidak dapat membaiki kekurangan kredibiliti SD2 kerana: (a) SD2 tidak hadir pada masa si mati kononnya memberi arahan lisan di rumah si mati untuk SD1 mendraf wasiat tersebut (pada April 2014); (b) SD2 tidak bercakap dengan si mati semasa si mati menandatangani wasiat tersebut; dan (c) SD2 tidak berkomunikasi dengan si mati sebelum dan selepas penyempurnaan wasiat tersebut oleh si mati (lihat perenggan 50).

(4) Mahkamah mendapati bahawa pada masa si mati menandatangani

wasiat tersebut, terdapat keraguan sebenar mengenai keupayaan perwasiatan si mati berdasarkan keterangan berikut: (a) keterangan SP2 berhubung kealpaan si mati; (b) keterangan perayu-perayu yang membuktikan bahawa pada akhir tahun 2010, apabila si mati berumur 93 tahun, si mati telah mula nyanyuk; (c) semasa si mati menandatangani wasiat tersebut, si mati berada pada usia yang sangat tua iaitu 97 tahun; dan (d) Keterangan SD1 semasa pemeriksaan balas bahawa si mati 'agak pelupa'. Mengambil kira keraguan sebenar mengenai keupayaan perwasiatan si mati, golden rule (kes *Simpson*) sepatutnya diikuti bagi wasiat tersebut, iaitu, sepatutnya ada pengamal perubatan yang menjadi saksi yang: (i) membuat pemeriksaan ke atas si mati; (ii) berpuas hati mengenai keupayaan perwasiatan si mati; dan (iii) membuat rekod pemeriksaannya terhadap si mati (lihat perenggan 51).

(5) Dapatan fakta Mahkamah Tinggi bahawa si mati mempunyai keupayaan perwasiatan untuk menandatangani wasiat tersebut adalah jelas salah atas sebab-sebab berikut: (a) SD1 bukan saksi yang boleh dipercayai; (b) keterangan SD2 tidak dapat menyokong dapatan fakta tersebut; (c) memandangkan wujudnya keraguan sebenar mengenai keupayaan perwasiatan si mati, golden rule (kes *Simpson*) sepatutnya diikuti dalam kes semasa; (d) pengakuan SD1 semasa pemeriksaan balas bahawa dia tidak bertanya kepada si mati apa-apa soalan untuk menguji keupayaan perwasiatan si mati sebelum si mati menandatangani wasiat tersebut; dan (e) memandangkan sifat kompleks kandungan wasiat tersebut, SD1 mahupun SD2 tidak dapat membuktikan kewujudan keupayaan perwasiatan si mati dalam kes semasa (lihat perenggan 52).

(6) Peristiwa-peristiwa berikut jelas menyokong kesimpulan bahawa si mati tidak mempunyai keupayaan perwasiatan untuk menyempurnakan wasiat tersebut: (a) empat rakaman video si mati dan transkripnya yang dikemukakan oleh perayu-perayu; (b) kelakuan sesuatu pihak adalah relevan di bawah s 8(2) Akta Keterangan 1950 — dalam kes semasa, kelakuan responden-responden dengan jelas membuktikan bahawa mereka secara aktif menyembunyikan tentang kekurangan keupayaan perwasiatan si mati, antara lain, kegagalan mereka untuk memanggil Dr Lim (yang telah memeriksa si mati sebanyak 11 kali) untuk memberikan keterangan pakar berkenaan keupayaan perwasiatan si mati dan kegagalan tersebut menjustifikasikan penggunaan inferens bertentangan di bawah s 114(g) Akta Keterangan 1950; dan (c) tidak ada sebab atau keperluan bagi responden-responden untuk memperbadankan Kong Siew Tiong Property Sdn Bhd ('KSTP') untuk menguruskan aset dan perniagaan si mati jika si mati mempunyai keupayaan perwasiatan untuk menyempurnakan wasiat tersebut. Memandangkan tiada bukti keupayaan perwasiatan si mati di atas imbangan kebarangkalian, responden-responden perlu membuktikan bahawa si mati mengetahui dan meluluskan kandungan wasiat tersebut. Walau bagaimanapun, tiada

bukti sedemikian telah dikemukakan oleh responden-responden dalam kes semasa (lihat perenggan 52 & 58).

(7) Dapatan fakta Mahkamah Tinggi bahawa tiada keadaan yang mencurigakan mengenai pembuatan wasiat tersebut adalah jelas salah atas sebab-sebab berikut: (a) wasiat tersebut lebih memihak kepada responden-responden berbanding dengan perayu-perayu, justeru, responden-responden mempunyai motif kewangan mengikut pengertian s 8(1) Akta Keterangan 1950; (b) responden pertama terlibat dalam penyediaan wasiat tersebut sejak awal lagi; (c) responden pertama berada di rumah si mati pada masa si mati dikatakan mengarahkan SD1 untuk menyediakan wasiat tersebut; (d) SD1 tidak mengemukakan rekod SD1 tentang arahan lisan si mati untuk SD1 mendraf wasiat tersebut sebagai keterangan dalam perbicaraan; (e) fakta bahawa wasiat tersebut tidak memasukkan tiga aset (termasuk kepentingan si mati dalam dua perkongsian perniagaan dan sebuah kereta Mercedes Benz) menimbulkan syak wasangka bahawa wasiat tersebut tidak sah; dan (f) kehadiran responden pertama dan kedua ketika SD1 didakwa membaca dan menjelaskan wasiat tersebut kepada si mati dan ketika si mati menandatangani wasiat tersebut akan menimbulkan syak wasangka bahawa wasiat tersebut tidak sah (lihat perenggan 55).

(8) Selain itu, SD1 telah mengakui semasa pemeriksaan balas bahawa SD1 tidak merekodkan di mana-mana bahawa SD1 telah membaca dan menerangkan kandungan wasiat tersebut kepada si mati dan si mati memahami penjelasan SD1 tentang kandungan wasiat tersebut. Seterusnya, selepas penyempurnaan wasiat tersebut oleh si mati, SD1 menyerahkan wasiat tersebut kepada responden pertama. Si mati tidak diberikan salinan wasiat tersebut oleh responden pertama. wasiat tersebut disimpan di dalam peti keselamatan yang terletak di dalam bilik di rumah si mati dan responden kedua telah memasang pagar gril di pintu bilik tersebut. Hanya responden kedua yang menyimpan kunci peti keselamatan tersebut. Si mati mempunyai hak untuk membatalkan wasiat tersebut atau meminda wasiat tersebut melalui kodisil. Tanpa salinan wasiat tersebut, hak tersebut menjadi sia-sia. Berdasarkan keterangan dan alasan-alasan di atas, mahkamah memutuskan bahawa responden-responden gagal melepaskan beban undang-undang dan beban keterangan mereka untuk menafikan kewujudan keadaan yang mencurigakan dalam kes semasa (lihat perenggan 55–56).

(9) Perayu-perayu telah berjaya melepaskan beban undang-undang dan beban keterangan untuk membuktikan atas imbangan kebarangkalian bahawa si mati telah menyempurnakan wasiat tersebut di bawah pengaruh tak wajar, manipulasi, kawalan dan/atau penguasaan responden-responden berdasarkan alasan-alasan dan keterangan berikut: (a) sejak tahun 2009, si mati berkerusi roda dan responden kedua yang

telah menjaga si mati, malahan responden pertama telah menggantikan perayu keempat sebagai pemandu peribadi si mati; (b) tanpa apa-apa sebab, responden-responden telah menghentikan perundingan si mati dengan SP2 dan membawa si mati untuk berunding dengan doktor lain; (c) responden-responden mempunyai kawalan ke atas perniagaan si mati melalui KSTP; (d) responden-responden yang berupaya untuk menghalang perayu-perayu daripada membawa si mati untuk berunding dengan pakar geriatrik; (e) hak si mati untuk membatalkan wasiat tersebut atau meminda wasiat tersebut melalui kodisil telah dinafikan oleh responden pertama dan kedua; dan (f) responden-responden telah secara curi-curi membawa si mati dari rumah si mati ke rumah responden ketiga dan selepas itu, perayu-perayu tidak dibenarkan oleh responden-responden untuk berjumpa dengan si mati (lihat perenggan 59–60).

Cases referred to

Ashkettle, Re; Ashkettle and another v Gwinnett [2013] EWHC 2125 (Ch); [2013] WTLR 1331, Ch D (refd)
Bailey v Bailey (1924) 34 CLR 558, HC (refd)
Banks v Goodfellow (1870) LR 5 QB 549, QBD (refd)
Chin Jhin Thien & Anor v Chin Huat Yean @ Chin Chun Yean & Anor [2020] 4 MLJ 581 (folld)
Ernest Ferdinand Perez De La Sala v Compañia De Navegación Palomar, SA and others and other appeals [2018] 1 SLR 894, CA (folld)
Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (folld)
Hoff and others v Atherton [2004] EWCA Civ 1554, CA (folld)
Hughes v Pritchard and others [2022] Ch 339, CA (refd)
Leonard and others v Leonard (by her litigation friend Sharon Thompsett) and others [2024] EWHC 321 (Ch), Ch D (folld)
Lilies Suraya Abdul Latib v Khairul Sabri [2020] 4 AMR 365, HC (refd)
Munusamy v PP [1987] 1 MLJ 492, SC (refd)
Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67, FC (folld)
Ong Eng Hock & Anor v Ong Cheng Guan & Anor [2018] 5 MLJ 701; [2018] 7 CLJ 154, FC (refd)
Simpson, Re, Schaniel v Simpson (1977) 121 Sol Jo 224 (refd)
Tho Yow Pew & Anor v Chua Kooi Hean [2002] 4 MLJ 97; [2002] 4 CLJ 90, CA (refd)

Legislation referred to

Contracts Act 1950 ss 11, 12, 12(1), (2), (3)
Evidence Act 1950 ss 8(1), (2), 101, 101(1), (2), 102, 114(g)
Probate and Administration Act 1959 s 34
Wills Act 1959 ss 2, 3, 5(1), (2)

Appeal from: *Kong Kin Lay & Ors v Kong Kin Siong & Ors and other cases* [2023] MLJU 1858 (High Court, Kuala Lumpur)

Manjit Kaur Gill (with Keeshantini a/p Baskeran and Lavinderdeep Singh) (Manjit Lavinder & Co) for the appellants.

Chok Zhin Theng (with Michelle Chin Zi Shan) (Cheah Teh Su) for the respondents.

Wong Kian Kheong JCA (delivering judgment of the court):

A. INTRODUCTION

[1] This judgment discusses whether a will executed on 10 May 2014 ('will') by Mr Kong Siew Tong ('deceased') is valid or otherwise. At the time of the execution of the will, the deceased was 97 years old. Hence, the following issues, among others, arose in this case:

(1) whether the 'golden rule' as laid down by Templeman J (as he then was) in the High Court of United Kingdom ('UK') in *Simpson, Re, Schaniel v Simpson* (1977) 121 Sol Jo 224 ('golden rule (*Simpson*'s case)'), should have been followed in this case. According to the golden rule (*Simpson*'s case), the will (signed by a person advanced in age) should have been witnessed and approved by a medical practitioner who satisfies himself or herself as to the deceased's testamentary capacity and makes a record of his or her examination of the deceased's testamentary capacity; and

(2) is the golden rule (*Simpson*'s case):

(a) a rule of case law which is binding from the view point of the doctrine of stare decisis; or

(b) a rule of prudence and good practice for guidance only (so as to avoid injustice, costly and protracted litigation)?

B. BACKGROUND

[2] The deceased:

(1) had two wives and 13 children;

(2) was a successful businessman who had substantial properties, moveable and immovable; and

(3) was illiterate. The deceased depended on others to explain and/or translate contents of documents to him.

[3] All the parties in this appeal ('this appeal') are children of the deceased.

[4] The deceased was wheelchair-bound since 2009. The second respondent in this appeal ('second respondent'), the deceased's daughter, took care of the deceased in the deceased's home in Dengkil ('deceased's home'). A

[5] Dr Lim Tye Leng ('SP2') is a consultant physician and cardiologist in Pantai Hospital, Cheras ('Pantai Cheras Hospital'). According to SP2's evidence: B

(1) SP2 was the personal physician of the deceased for a total period of more than 17 years (from 4 June 1996 until 31 October 2013);

(2) the deceased suffered a fall and was admitted to Pantai Cheras Hospital on 18 February 2012. The deceased could not remember what had happened to him ('deceased's forgetfulness (18 February 2012)'); and C

(3) dementia is a clinical condition where there is a gradual deterioration of recent memory, ability to focus and think critically. Early signs of dementia in a person are the person's forgetfulness of recent events and the person would gradually develop behavioral changes and may lose his or her ability to look after himself or herself. D

[6] Without informing the appellants in this appeal ('appellants'), the respondents in this appeal ('respondents') discontinued the deceased's consultation with SP2. The respondents then brought the deceased to consult Dr Lim Chin Seng ('Dr Lim'), a consultant physician and nephrologist at Pantai Hospital, Ampang. Dr Lim had examined the deceased for a total of 11 times, from 18 March 2016 to 19 January 2017. E F

[7] Mr Kong Kim Leng ('SD1'), a senior advocate and solicitor ('A&S'), gave the following evidence, among others: G

(1) in April 2014:

(a) the first respondent in this appeal ('first respondent') telephoned SD1 and asked SD1 to come to the deceased's home because the deceased wished to make a will; H

(b) SD1 came to the deceased's home; and

(c) at the deceased's home:

(i) the deceased orally instructed SD1 to prepare the will ('deceased's oral instructions (will)'); and I

(ii) for the purpose of SD1's preparation of the will, the deceased handed to SD1 a bundle of documents which contained the following documents:

(ii)(a) photocopies of titles of land which were owned by the deceased;

(ii)(b) photocopies of certificates of shares owned by the deceased; and

(ii)(c) photocopies of identity cards of the deceased's beneficiaries of the will,

('bundle (documents)').

(2) on Saturday, 10 May 2014:

(a) the first respondent drove the deceased to SD1's office in the deceased's car ('car');

(b) the second respondent accompanied the deceased and first respondent in the car to SD1's office (on the first floor of a building); and

(c) when the deceased, first and second respondents arrived at SD1's office:

(i) SD1 and SD1's clerk, Ms Chong Siew Eng ('SD2'), came down from SD1's office and went to the car;

(ii) SD1 got inside the car and sat next to the deceased;

(iii) the window of the car was wound down and SD2 stood beside the car and next to the deceased;

(iv) for about 20 to 30 minutes, SD1 read and explained, mainly in Hokkien dialect, the contents of the will ('contents (will)') to the deceased;

(v) the deceased nodded his head in agreement with the contents (will). At one point, the deceased asked SD1 to explain one of the clauses in the will;

(vi) the deceased signed the will;

(vii) SD1 and SD2 attested to the execution of the will by the deceased; and

(viii) SD1 handed the will to the first respondent.

[8] Both SD1 and SD2 gave evidence that the deceased had the testamentary capacity to sign the will.

[9] The will was kept in one of the deceased's two safe boxes ('safe box (will)') kept in a room in the deceased's home ('room (safe boxes)'). The following evidence concerned the safe box (will):

(1) when the deceased was admitted to hospital in 2013, the deceased gave the key to the safe box (will) ('key (safe box (will))') to the fourth appellant in this appeal ('fourth appellant'). However, the next day, the

second respondent requested the fourth appellant to give the key (safe box (will)) to the second respondent; and

(2) the second respondent erected a grill gate on the door of the room (safe boxes) ('grill gate (room (safe boxes))'). Consequently, only the second respondent had access to the will.

[10] The deceased was the majority shareholder and director of Kong Siew Tiong Property Sdn Bhd ('KSTP').

[11] Two days before the deceased executed the will, on 8 May 2014, the deceased signed a sale and purchase agreement regarding the sale of land to KSTP ('SPA (land)'). According to SD1, the SPA (land) was prepared by SD1 on the instruction of the deceased.

[12] On 12 May 2014 (two days after the execution of the will by the deceased on 10 May 2014), the deceased signed an instrument of land transfer, ie, a memorandum of transfer regarding the subject matter of the SPA (land) ('MOT (land)'). SD1 gave evidence that he had prepared the MOT (land) upon the deceased's instruction.

[13] On behalf of the deceased, SD1 issued two demands dated 13 March 2015 and 9 July 2015 for another matter not related to this case ('SD1's two demands (2015)').

[14] Between 2013 and 2017, with regard to KSTP:

(1) the deceased oversaw a project by KSTP to construct eight units of shop lot ('project (KSTP)');

(2) the deceased appointed contractors for the project (KSTP) ('contractors (KSTP project)') and the construction cost of the project (KSTP) was RM6m;

(3) the deceased liaised with the contractors (KSTP project) with regard to the progress payment claims by the contractors (KSTP project);

(4) one of the contractors (KSTP project) was Neng Kan Construction Sdn Bhd ('NKC'). Mr Richard Ung Neng Kian ('SD7'), a director of NKC, testified that he received instruction from the deceased regarding the KSTP Project;

(5) the deceased signed cheques for KSTP;

(6) the deceased held meetings with the contractors (KSTP project), KSTP's banker and solicitor; and

(7) the deceased chaired an Extra-Ordinary General Meeting of KSTP's

shareholders on 9 January 2017 ('KSTP's EGM (9 January 2017)').

[15] The deceased celebrated his 100th birthday on 31 May 2015 (100th birthday according to Chinese customs but 99 years old according to the Gregorian calendar).

[16] Sin Leong Seng Motor Sdn Bhd ('SLSM') is a company owned by the deceased's family. By way of two letters dated 12 July 2015, the deceased disclaimed his legal rights in respect of a dispute regarding SLSM (not related to this case) ('deceased's two disclaimer letters (SLSM, 12 July 2015)').

[17] The deceased executed a power of attorney on 14 August 2015 ('deceased's PA (14 August 2015)') in favour of the first appellant and the third respondent in this appeal ('third respondent').

[18] In December, 2015, the deceased had a fall in the toilet and suffered severe injuries. He was then admitted to Gleneagles Hospital, Ampang ('Gleneagles Ampang Hospital'). In Gleneagles Ampang Hospital:

(1) on 29 December 2015, the deceased underwent a 'CT (Computed Topography) Scan' of his brain ('deceased's CT brain scan'). With regard to the deceased's CT brain scan, Dr Azurah Zainal Abidin ('SP1'), a consultant radiologist, prepared, among others, a 'Diagnostic Imaging Reports' in exh P1(b);

(2) the doctors who examined the deceased, recommended that he should consult a geriatric specialist, a medical doctor who specialises in the healthcare of older adults ('geriatrics');

(3) the first appellant in this appeal ('first appellant') requested for the deceased (who was warded in Gleneagles Ampang Hospital) to consult Dr Soraya Kunayagam, a geriatrics in the same Gleneagles Ampang Hospital; and

(4) the respondents caused an early discharge of the deceased from Gleneagles Ampang Hospital. Hence, the deceased could not consult a geriatrics ('from Gleneagles Ampang Hospital, December, 2015)').

[19] On 13 January 2016, the first appellant, the second appellant, fourth appellant, the fifth and seventh appellants in this appeal ('second appellant', 'fifth appellant' and 'seventh appellant'), attempted to take the deceased from the deceased's home for a consultation with the geriatrics at Gleneagles Ampang Hospital. However, the first and second respondents prevented the deceased from being taken to Gleneagles Ampang Hospital ('conduct of the first and second respondents (prevention of geriatrics' examination of deceased (13 January 2016))').

[20] The fourth, fifth and seventh appellants together with the third appellant in this appeal ('third appellant)') attempted to take the deceased for a consultation with the geriatrics at Gleneagles Ampang Hospital on 18 July 2016. This attempt was again prevented by the first and second respondents ('conduct of the first and second respondents (prevention of geriatrics' examination of deceased (18 July 2016))').

[21] On 20 July 2016, without informing the appellants, the first and second respondents took the deceased from the deceased's home to the third respondent's home in a gated community in Bukit Mewah, Kajang ('third respondent's home').

[22] When the appellants discovered on their own that the deceased was staying in the third respondent's home, the appellants were not allowed by the respondents to meet the deceased in the third respondent's home. In fact, the third respondent instructed the security guards at the guardhouse of the third respondent's home ('guardhouse (third respondent's home)') that the appellants should not be allowed by the security guards to enter the third respondent's home. The photographs of the appellants, their car models and car numbers were given by the third respondent and posted at the guardhouse (third respondent's home).

[23] The second respondent continued to take care of the deceased in the third respondent's home and the first respondent replaced the fourth appellant as the deceased's driver.

[24] In 2016, Mr Leong Yi Chuan ('SD5'), a freelance Chinese interpreter, gave evidence that he had translated an affidavit (not related to this case) in Hokkien to the deceased.

[25] The appellants adduced four video recordings of the deceased on 19 July 2015, 13 January 2016, 3 April 2016 and 18 July 2016 ('four video recordings'). The transcripts of the four video recordings ('transcripts (four video recordings)') were also provided by the appellants.

[26] The deceased passed away on 22 March 2017 in the third respondent's home at the age of 99 years.

C. PROCEEDINGS IN THE HIGH COURT

C(1). Three suits in the High Court ('three suits')

[27] This appeal arose from the following three suits:

(1) on 16 June 2017, the first respondent filed an ex parte Originating Summons No WA-32(NCVC)-1019–06 of 2017 ('Suit No 1019') for, among others, an order of probate of the will ('probate'). In Suit No 1019, among others:

(a) the first to sixth appellants entered caveats with regard to the grant of the probate; and

(b) the first appellant filed affidavits to oppose Suit No 1019 on, among others, the ground that the deceased did not possess testamentary capacity to execute the will.

(2) Suit No WA-22NCVC-494–09 of 2017 ('Suit No 494') had been instituted by the first to sixth appellants against the respondents for, among others, the following orders:

(a) a declaration that the will was not valid;

(b) a declaration that the deceased had died intestate; and

(c) an order to appoint the first appellant as an administrator of the deceased's estate ('estate').

The respondents counterclaimed in Suit No 494 for, among others, a declaration that the will is valid and an order to distribute the estate in accordance with the will; and

(3) Suit No WA-22NCVC-402–08 of 2017 ('Suit No 402') had been commenced by the seventh appellant against the first appellant and first respondent for the following orders, among others:

(a) the will was not valid;

(b) a declaration that the deceased had died intestate; and

(c) an order to appoint Amanah Raya Bhd as an administrator of the estate.

[28] Suit Nos 402, 494 and 1019 had been consolidated by two orders of the High Court dated 23 November 2017 and 7 February 2018 ('consolidated suits').

C(2). The High Court's decision

[29] After a trial of the consolidated suits ('trial'), on 3 February 2023, the learned High Court judge decided as follows, among others ('High Court's decision'):

(1) the deceased had testamentary capacity to sign the will ('High Court's factual finding (deceased's testamentary capacity)');

(2) there were no suspicious circumstances regarding the making of the will

('High Court's factual finding (no suspicious circumstances regarding the making of the will)');

(3) the deceased did not execute the will under undue influence, manipulation, control and/or domination of the respondents ('High Court's factual finding (no undue influence/manipulation/control/domination of the deceased)');

(4) the following declarations were granted:

(a) the will is valid and enforceable; and

(b) the estate shall be administered in accordance with the will.

(5) probate was granted to the first respondent;

(6) the first respondent was appointed as the sole executor of the estate ('sole executor');

(7) the following orders of costs (subject to allocatur fees) were made:

(a) a sum of RM90,000 shall be paid by the appellants to the respondents as costs for Suit No 494;

(b) the first to sixth appellants (as caveators) shall pay an amount of RM10,000 to the first respondent for the costs of Suit No 1019; and

(c) a sum of RM5,000 shall be paid by the appellants to the respondents as costs for Suit No 402.

(8) an independent trust company ('trust co') is to be appointed by the High Court. The trust co:

(a) shall assist the sole executor regarding the distribution of the estate ('distribution (estate)') until the complete distribution (estate);

(b) shall be paid by the estate;

(c) shall report to the High Court and solicitors for all the parties ('solicitors (all parties))') once every three months until the complete distribution (estate); and

(d) shall be present together with the solicitors (all parties) for the opening of the deceased's safe boxes and to prepare a written report regarding the contents of the safe boxes (to be filed in the High Court); and

(9) the first respondent shall file a list of assets and liabilities of the deceased within one month from the date of the High Court's decision.

[30] According to the 'Grounds of Judgment' of the High Court ('GOJ'), among others:

(1) in paras 60 to 67 of the GOJ, the learned High Court judge decided that the appellants' learned counsel should have asked SP1 regarding the deceased's mental state and such a failure attracted an adverse inference against the appellants under s 114(g) of the Evidence Act 1950 ('the EA');

(2) the following reasons were given for the High Court's factual finding (deceased's testamentary capacity):

(a) the learned High Court judge found, among others, SD1 to be a credible witness ('High Court's factual finding (SD1 was a credible witness)') — paras 55 to 59 of the of the GOJ;

(b) according to paras 68 to 72 of the GOJ, the High Court held that SP2's expert evidence could not prove that the deceased was suffering from dementia; and

(c) the deceased was not 'insane' when he executed the will and his forgetful nature due to his advanced age, did not affect his mental capacity to make an informed decision to dispose of his assets — paras 75 and 76 of the GOJ.

(3) in paras 77 to 110 of the GOJ, the learned High Court judge gave reasons for the High Court's factual finding (no suspicious circumstances regarding the making of the will);

(4) the High Court's factual finding (no undue influence/manipulation/control/domination of the deceased) was explained in paras 111 to 138 of the GOJ; and

(5) the requirements of ss 3, 5(1) and (2) of the Wills Act 1959 ('the WA') had been complied with in this case — paras 139 to 148 of the GOJ.

D. THIS APPEAL

[31] The seventh appellant withdrew her appeal on 20 February 2023. As such, the term 'appellants' in this judgment shall only refer to the first to sixth appellants only.

E. ISSUES

[32] In this appeal, the following questions arise:

(1) whether there should be appellate intervention for the following parts of the High Court's decision:

(a) the High Court's factual finding (SD1 was a credible witness);

(b) the High Court's factual finding (deceased's testamentary capacity);

(c) the High Court's factual finding (no suspicious circumstances regarding the making of the will); and

(d) the High Court's factual finding (no undue influence/manipulation/control/domination of the deceased).

(2) did the learned High Court judge erroneously make an adverse inference under s 114(g) of the EA against the appellants for not asking SP1 regarding the deceased's testamentary capacity to make the will? and

(3) whether the High Court should have drawn an adverse inference pursuant to s 114(g) of the EA against the respondents for the suppression of the following material evidence:

(a) SD1's record of the deceased's oral instructions given in the deceased's home for SD1 to draft the will ('SD1's record (deceased's oral instructions (will))'); and

(b) Dr Lim was not subpoenaed by the respondents to testify in this case regarding the deceased's testamentary capacity.

OUR DECISION

F. Requirements for a valid will

[33] For a will to be valid:

(1) the will has to comply with all the formal requirements of s 5(1) and (2) of the WA ('requirements (s 5 of the WA)');

(2) the testator has testamentary capacity under s 3 of the WA to execute the will ('testamentary capacity');

(3) there are no suspicious circumstances regarding the execution of the will ('suspicious circumstances'); and

(4) the testator did not sign the will under an undue influence of another person ('undue influence').

[34] In this case, the requirements (s 5 of the WA) had been fulfilled.

F(1). Testamentary capacity

[35] We reproduce below the definition of 'will' in s 2 and s 3 of the WA:

s 2 *Interpretation and application*

(1) *In this Act, unless there is something repugnant in the subject or context —*

A ...

'will' means a declaration intended to have legal effect of the intentions of a testator with respect to his property or other matters which he desires to be carried into effect after his death and includes a testament, a codicil and an appointment by will or by writing in the nature of a will in exercise of a power and also a disposition by will or
B testament of the guardianship, custody and tuition of any child.

...

s 3 *Property disposable by will*

Except as hereinafter provided, every person of sound mind may devise, bequeath or
C *dispose of by his will, executed in manner hereinafter required, all property which he owns or to which he is entitled either at law or in equity at the time of his death notwithstanding that he may have become entitled to the same subsequently to the execution of the will.* (Emphasis added.)

D **[36]** Firstly, it is clear from:

(1) the definition of 'will' in s 2 of the WA (*a declaration intended to have legal effect of the intentions of a testator with respect to his property or other matters which he desires to be carried into effect after his death*); and

E (2) s 3 of the WA (*every person of sound mind may devise, bequeath or dispose of by his will*),
– that a testator must have testamentary capacity in the sense that the testator has the soundness of mind to make a will.

F **[37]** Secondly, the meaning of testamentary capacity has been explained by our appellate courts as follows:

(1) in the Federal Court case of *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1, at [1], [16], [18] and [19], Steve Shim CJ
G (Sabah and Sarawak) decided as follows:

[1] The Federal Court had, on 28 July 2003, granted the appellants leave to appeal on 29 questions. In their memorandum of appeal, the appellants have converted these questions into 29 grounds of appeal. *Before us, the appellants' counsel has categorised these grounds under five specific heads as follows*:

H (1) The appellate intervention question;

(2) *The testamentary capacity question;*

(3) The forgery question;

(4) *The suspicious circumstances question;*

I (5) The so-called 'Flannery' question;

...

[16] *It is trite law that for a will to be valid, a testator must have testamentary capacity. Whether a testator has testamentary capacity depends on the facts of each case. What is*

meant by testamentary capacity has been laid down by Chief Justice Cockburn more than a century ago in Banks v Goodfellow (1870) LR 5 QB 549. *This case was cited copiously by the Court of Appeal in the instant case. For the sake of emphasis it is appropriate to repeat the sentiments expressed by Cockburn CJ who said, inter alia:*

> *It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties — that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made …*
>
> *In deciding upon the capacity of the testator to make his will, it is the soundness of the mind and not the particular state of bodily health, that is to be attended to; the latter may be in a state of extreme imbecility, and yet he may possess sufficient understanding to direct how his property shall be disposed of …*
>
> *…*

[18] *The Court of Appeal held that the time for determining the mental capacity of the testator who made the will was the time when the will was executed. The court cited various authorities including Billinghurst v Vickers* (1810) ER 956*; Choo Ah Pat v Chow Yee Wah* [1974] 1 MLJ 62*; R Mahendran v R Arumuganathan* [1999] 2 SLR 579. *Theobald on Wills (15th Ed) was also relied on, in particular at p 32 which stated that 'the testator must have testamentary capacity at the time he executes the will'. Banks v Goodfellow was cited as a footnote. In our view, that is the correct statement of the law.*

[19] *As regards the burden of proof, the Court of Appeal quite rightly stated the settled law, ie that where the validity of a will was challenged, the burden of proving testamentary capacity and due execution lay on the propounder of the will as well as dispelling any suspicious circumstances surrounding the making of the will; that the onus of establishing any extraneous vitiating element such as undue influence, fraud or forgery lay with those who challenged the will. In this connection, we find the approach taken by the High Court of Australia in william Henry Bailey & Ors v Charles Lindsay Bailey & Ors* (1924) 34 CLR 558 *to be instructive. Therein Isaacs J said, inter alia:*

> (1) *The onus of proving that an instrument is the will of the alleged testator lies on the party propounding it; if this is not discharged, the court is bound to pronounce against the instrument.*
>
> (2) *This onus means the burden of establishing the issue. It continues during the whole case and must be determined upon the balance of the whole evidence.*
>
> (3) *The proponent's duty is, in the first place, discharged by establishing a prima facie case.*
>
> (4) *A prima facie case is one which, having regard to the circumstances so far established by the proponent's testimony, satisfies the court judicially that the will propounded is the last will of a free and capable testator.*
>
> (5) *A man may freely make his testament, how old soever he may be; for it is not*

the integrity of the body, but of the mind, that is requisite in testaments.

(6) *The quantum of evidence sufficient to establish a testamentary paper must always depend upon the circumstances of each case, because the degree of vigilance to be exercised by the court varies with the circumstances.*

(7) *As instances of such material circumstances may be mentioned:*

(a) *the nature of the will itself regarded from the point of simplicity or complexity, or of its rational or irrational provisions, its exclusion or non-exclusion of beneficiaries;*

(b) the exclusion of persons naturally having a claim upon the testator;

(c) *extreme age*, sickness, *the fact of* the drawer of the will or *any person having motive and opportunity and exercising undue influence taking a substantial benefit*.

(8) *Once the proponent establishes a prima facie case of sound mind, memory and understanding with reference to the particular will, for capacity may be either absolute or relative, then the onus probandi lies upon the party impeaching the will to show that it ought not to be admitted to proof.*

(9) *To displace a prima facie case of capacity and due execution, mere proof of serious illness is not sufficient: there must be clear evidence that undue influence was in fact exercised, or that the illness of the testator so affected his mental faculties as to make them unequal to the task of disposing his property.*

(10) *The opinion of witnesses as to the testamentary capacity of an alleged testator is usually for various reasons of little weight on the direct issue.*

(11) *While, for instance, the opinions of the attesting witnesses that the testator was competent are not without some weight, the court must judge from the facts they state and not from their opinions.* (Emphasis added.)

(2) Mohd Zawawi Salleh FCJ delivered the following judgment of the Federal Court in *Chin Jhin Thien & Anor v Chin Huat Yean @ Chin Chun Yean & Anor* [2020] 4 MLJ 581, at paras [52] to [55], [62] to [64], [69] to [71], [76], [77] and [81]:

[52] *Generally speaking, testamentary capacity refers to the ability of a person to make a valid will. From the authorities, testamentary capacity is referred to as the 'sound disposing mind' of the testator. A testator is said to have testamentary capacity when the testator is fully conscious, has a sound mind, understands and approves the contents of the will.*

[53] *The meaning of testamentary capacity was explained by Cockburn CJ in Banks v Goodfellow* (1870) LR 5 QB 549*, in the following words:*

...

[54] *The case of Banks v Goodfellow not only lays down the test for will-making capacity, but also makes it clear that a partial unsoundness of mind, not affecting the person's general faculties and not operating on the person's mind in regard to a particular*

testamentary disposition, will not be sufficient to deprive the person of the power to dispose of their property in a will.

[55] *The Federal Court in Udham Singh v Indar Kaur* [1971] 2 MLJ 263 and *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309 *adopted and applied the meaning of testamentary capacity as enunciated by Chief Justice Cockburn in Banks v Goodfellow.*

...

[62] *Testamentary capacity cannot be equated with contractual capacity. In the words of His Lordship Gopal Sri Ram JCA (as he then was) in Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97*:*

> *Thus, it may be soon that testamentary capacity is not to be equated with contractual capacity. A person may lack the mental capacity to enter into a contract and yet may have sufficient testamentary capacity.*

[63] *We venture to suggest that this approach is consistent with the concept of task-specific capacity, that is, that a person's capacity to make a decision in one area or task (for example will-making) is distinct and separate, and therefore cannot be extrapolated from their capacity to perform another task (for example entering into a contract and making decision about finances etc).*

[64] *It is also a well settled principle that to displace prima facie testamentary capacity and due execution, mere proof of serious illness is not sufficient. There must be clear evidence that the illness of the testator so affected his mental faculties as to make the deceased unequal to the task of disposing of his property.*

...

[69] *In an English case*, *Simpson, Re, Schaniel v Simpson* (1977) 121 Sol Jo 224*, the court stated that the making of a will by an old and infirmed testator ought to be witnessed and approved by a medical practitioner who satisfies himself as to the capacity and understanding of the testator and makes a record of his examination and findings.*

[70] *However, it has been established by the Court of Appeal of England and other jurisdiction after Re Simpson that the principle stated in Re Simpson which is also known as 'golden rule' is merely guidance for solicitor and noncompliance did not mean that there was a lack of capacity. For an example in the case of In the Matter of the estate of Eva Burns, deceased; Burns and others v Burns* [2016] EWCA Civ 37*, it was held as follows:*

> *The judge was also well aware of 'the golden rule' and Mr Welton's apparent ignorance of it. It has to be recalled, however that the 'rule' is a prudent guide for solicitors dealing with a will for an aged testator or one who has been seriously ill. As is pointed out in williams Op Cit at para 4.21, however, the rule does not constitute a rule of law but provides guidance as to a means of avoiding disputes; 'it is not a touchstone of validity or a substitute for established tests of capacity or knowledge and approval'*. (Emphasis added.)

[71] *In Key and another v Key and others* [2010] EWHC 408 (Ch)*, Briggs J noted that the 'golden rule' was not a rule of law affecting the validity of a will, but a recommendation for good practice. He said:*

A *Compliance with the golden rule does not, of course, operate as a touchstone of the validity of a will, nor does non-compliance demonstrate its invalidity. Its purpose, as has repeatedly been emphasized, is to assist in the avoidance of disputes, or at least in the minimization of their scope. As the expert evidence in the present case confirms, persons with failing or impaired mental faculties may, for perfectly understandable*
B *reasons, seek to conceal what they regard as their embarrassing shortcomings from persons with whom they deal, so that a friend or professional person such as a solicitor may fail to detect defects in mental capacity which would be or become apparent to a trained and experienced medical examiner, to whom a proper description of the legal test for testamentary capacity had first been provided.*

C ...

[76] *In the light of the authorities discussed above, the position in law on testamentary capacity is clear: if the testator is ill, it does not deprive his ability or capacity to execute it. There must be clear evidence to depict on insane delusion existing in the testator's mind at the time of making of the will. Essentially, it is sufficient for the testator, at the*
D *time the will is executed to have sufficient mental ability to understand he is making a will, the effect of making the will, and the general nature and extent of his property. The duty of the court is to give effect to the will of the testator and not deprive him of the right to select the beneficiaries based on his wish.*

E [77] *Having said that, we must emphasise that testamentary capacity assessments are ultimately questions of fact to be determined by courts when the issue of a person's capacity arises in the course of legal proceedings. Therefore, the courts must scrutinise of all the relevant evidence that was presented at the trial before reaching a decision on the balance of probabilities.* ...

F ...

[81] *The Federal Court in Ong Eng Hock & Anor v Ong Cheng Guan & Anor* [2018] 5 MLJ 701; [2018] 7 CLJ 154 *held as follows:*

Leave question 1: Whether the probate rule that the burden of proving that the instrument so propounded is the last will and testament of the testator applies in a case
G *where the impugned will has already been admitted into probate and a sealed grant of probate issued by the High Court?*

Answer: 'Those who propound a will must show that the will of which probate is sought is the will of the testator ... has to prove its due execution and valid execution and if there are any suspicious circumstances ... remove them from the mind of the
H *court. ...' But where a will has been admitted to probate, the person who seeks revocation of the probate has to establish sufficient cause. ...* (Emphasis added.)

(3) according to Gopal Sri Ram JCA (as he then was) in the Court of Appeal case of *Tho Yow Pew & Anor v Chua Kooi Hean* [2002] 4 MLJ 97; [2002] 4 CLJ
I 90, at 93 to 94:

Now, the law upon the subject of a testator's testamentary capacity, we find to be well settled. The decided cases show quite clearly that very slight testamentary capacity is required for the making of a will. The cases in which wills have been held invalid for lack of testamentary capacity involve testators who were utterly insane either upon the finding

of the probate court or by reason of an order appointing a committee on the ground of insanity of the testator.

...

What the law requires to vitiate testamentary capacity is an insane delusion existing at the time of making of the will. This will include insanity at the time of the making or giving instructions for the making of the will. There are numerous authorities on the point ... (Emphasis added.)

[38] On testamentary capacity, we refer to three judgments from UK, namely:

(1) in the Court of Appeal case of *Hoff and others v Atherton* [2004] EWCA Civ 1554, at paras [34] and [35], Peter Gibson LJ decided as follows:

> [34] *... If there is evidence of actual understanding [of the testator], then that would prove the requisite capacity, but there will often be no such evidence, and the court must then look at all the evidence to see what inferences can properly be drawn as to capacity. Such evidence may relate to the execution of the will but it may also relate to prior or subsequent events. It would be absurd for the law to insist in every case on proof of actual understanding at the time of execution.*
>
> [35] *There will be cases, as the judge recognised, where a testator will not have testamentary capacity in the absence of an explanation. In Re Beaney dec'd* [1978] 1 WLR 770*, Mr Martin Nourse QC., sitting as a deputy judge of the High Court, held that a gift inter vivos by a mother of three children to one of them alone of the mother's only asset of value, at a time when she was in an advanced state of senile dementia, was void because the claims of the donee's siblings and the extent of the property to be disposed of were not explained to the mother. That was a case, as the judge in the present case found, in my view correctly, of a person who could not understand the relevant transaction and its effects without explanation. The test of capacity is issue-specific, as was pointed out by this court in Masterman:Lister v Brutton & Co (Nos 1 and 2)* [2003] 1 WLR 1511*: the question must be considered in relation to the particular transaction and its nature and complexity ...* (Emphasis added.)

(2) in *Hughes v Pritchard and others* [2022] Ch 339, at paras [63], [64], [75], [79], [80], [98], [99] and [103], Asplin LJ decided as follows in the Court of Appeal:

> [63] *On the basis of the Banks v Goodfellow test, in the circumstances of this case, therefore, there are three relevant questions to ask:*
>
> (i) *Was the deceased able to understand the nature of the act of making the 2016 will and its effect?*
>
> (ii) *Was the deceased able to understand the extent of the property of which he was disposing?*
>
> (iii) *Was the deceased able to comprehend and appreciate the claims to which he ought to give effect?*

A [64] *It is also common ground that the burden of proof in relation to testamentary capacity is on the person propounding the will. Where the will is duly executed and appears rational on its face, the court will presume capacity, in which case, the evidential burden shifts to the objector to raise a real doubt as to capacity. If a real doubt is raised, the burden shifts back to the person propounding the will to*
B *establish capacity, nonetheless: In re Key, decd* [2010] 1 WLR 2020 *per Briggs J (as he then was) at para 97. Further, despite the fact that expert evidence may be of great assistance, the issue as to testamentary capacity is a decision for the court: In re Key, decd, para 98.*

C *...*

[75] *Miss Reed [appellant's learned counsel] also relies on what is described as the very strong presumption that a will that has been drafted by an experienced independent lawyer should only be set aside on the clearest evidence of lack of mental capacity: Hawes v Burgess* [2013] WTLR 453. *She submits that the*
D *judge was wrong to ignore the presumption and there was no clear evidence of a lack of mental capacity and therefore, his finding was not open to him.*

...

[79] *In my judgment, Miss Reed was right not to suggest in her oral submissions that Mummery LJ's dicta in Hawes v Burgess amounts to a true presumption. It*
E *seems to me to be no more than a statement of the obvious. Where the will is explicable and rational on its face, the conclusion reached by an independent lawyer who is aware of the relevant surrounding circumstances, has taken instructions for the will and produced a draft, has met with the testator, is fully aware of the requirements of the law in relation to testamentary capacity and has*
F *discussed the draft and read it over to the testator, is likely to be of considerable importance when determining whether a testator has testamentary capacity. It is a very strong thing, as Mummery LJ described it, to find that such a testator was not mentally capable of making a will. It seems to me that Mummery LJ's use of 'presumption' was no more than a means of expressing the considerable importance of such evidence particularly in comparison with evidence from a medical expert*
G *who did not meet the testator and arrived at his conclusions on the basis of the papers only.*

[80] *I do not suggest that the evidence of such a solicitor is definitive and nor did Miss Reed. Although it is of very considerable importance and should be given due*
H *weight, obviously, the judge must evaluate all of the relevant evidence in relation to capacity. There may be clear evidence contrary to that of the solicitor. Furthermore, it should be borne in mind that the weight to be given to the conclusions reached by the lawyer drafting the will depends on the circumstances. As Christopher Pymont QC, sitting as a deputy High Court judge, quite properly pointed out in In re Ashkettle, decd* [2013] WTLR 1331, *para 43: 'Any view the*
I *solicitor may have formed as to the testator's capacity must be shown to be based on a proper assessment and accurate information or it is worthless ...' There may be good reason to place less reliance on the solicitor's evidence, depending on the circumstances.*

...

A

[98] *In relation to testamentary capacity, Lewison LJ, quoting Peter Gibson LJ in Hoff v Atherton* [2005] WTLR 99*, made clear that capacity is concerned with the potential to understand. It is not a test of memory or a requirement for actual recollection (paras 39 and 40). Lewison LJ went on to address the judge's finding that the testatrix had not been 'capable' of remembering why her earlier will had benefited one of her children, Robert, and concluded that what he meant was that she had forgotten. He stated that the judge's important finding was not that the testatrix had forgotten the terms of and reasons for her earlier will but: '[It] was that she was capable of accessing and understanding the information; but chose not to. Her decision to benefit her children equally was a perfectly rational decision … As an expression of understanding the claims upon her bounty that seems to me to be unexceptionable'. (Para 41.)*

B

C

[99] *Testamentary capacity does not require a testator to recall the terms of a past will they have made, or the reasons why it provided as it did, as long as they are capable of accessing the information, if needed, and of understanding it once reminded of it.*

D

…

[103] *I also agree with Miss Reed that if, and to the extent that the judge based his conclusions upon the difference between the 2016 will and what was described by Ian and by Dr Pritchard as a 'neatening up' exercise and concluded that the 2016 will was much more complex and therefore required greater capacity, he was wrong. It is common ground that capacity must be considered in relation to the transaction in question, its nature and complexity. It is issue-specific: Hoff v Atherton* [2005] WTLR 99*, para 35 per Peter Gibson LJ …* (Emphasis added.)

E

(3) according to Joana Smith J in the High Court case of *Leonard and others v Leonard (by her litigation friend Sharon Thompsett) and others* [2024] EWHC 321 (Ch), at paras [153] to [156], [158] and [159]:

F

[153] *Very recently, the Banks test was applied by the Court of Appeal in Hughes v Pritchard per Asplin LJ at [62]–[63]. Paraphrasing the questions posed in that case by Asplin LJ, the questions to be asked in this case when considering the first to third limbs of Banks are: (i) was Jack able to understand the nature of the act of making the 2015 will and its effect? (ii) was Jack able to understand the extent of the property of which he was disposing? and (iii) was Jack able to comprehend and appreciate the claims to which he ought to give effect?*

G

H

[154] *There was some argument at trial, in part prompted by Asplin LJ's identification of only three questions for determination in Hughes v Pritchard, over whether the fourth limb of the Banks test is really a sub-set of the third limb, or whether it stands on its own and, if the latter, exactly what it is intended to cover.*

I

[155] *In my judgment, the fourth limb is plainly a separate element, as was illustrated by the decision in Sharp v Adam (a case involving a testator who had multiple sclerosis) where the Court of Appeal upheld the Judge's decision that only the fourth element of the Banks test was not satisfied owing to the fact that the testator's will was irrational. The Court of Appeal observed at [69] that, with*

reference to the fourth limb, the judge could have asked 'whether [the testator's] human instincts and affections, or his moral sense, had been perverted by mental disease' (see also Kostic v Chaplin [2007] EWHC 2298 *per Henderson J at [198]). The Court of Appeal went on to observe at [93] that the fourth limb is 'concerned as much with mood as with cognition'. It is in this way that it is to be distinguished from the previous three limbs, which are purely concerned with cognition. Consideration of the fourth limb will often arise in the context of a case involving 'insane delusion' (and Banks was one such case), but it is clear that it is not solely applicable to such a case; a 'disorder of the mind' is a more general and diffuse concept admitting of a myriad of different forms of mental disease. This interpretation is evident in Gardiner v Tabet* [2021] EWHC 563 *(Ch) at [144], where, in dealing specifically with the fourth limb, Fancourt J said that 'although [the testator] did suffer a disease of the mind it was not such as to poison his mind [against potential beneficiaries] or such as to prevent him from making a just and rational testamentary disposition of his estate'.*

[156] *Against that background, I reject Ms McDonnell's submission that Asplin LJ's formulation of three questions in Hughes v Pritchard was intended to convey her understanding that the fourth limb of the Banks test forms part of the consideration of the third limb. On the contrary, in my judgment, Asplin LJ addressed only those three questions because they were the questions thrown up on the facts of that case. Asplin LJ did however expressly acknowledge (at [95]) that the existence of inexplicable or irrational provisions in a will is likely to raise 'serious doubt as to capacity', a reference which, to my mind, encompasses the fourth limb of Banks. Setting 'insane delusion' to one side, the fourth limb requires the court to consider whether a 'disorder of the mind' prevents a testator from making a just and rational disposition of his estate (whether because his affections have been poisoned, his sense of right has been perverted or the exercise of his natural faculties has been affected), the focus therefore being on the outcome of the disputed will.*

...

Burden of proof and evidence

[158] *It is common ground that testamentary capacity at the time of execution of a will may be presumed provided that the will is not irrational upon its face (i.e. in the way it is set out, not in terms of the rationality of its dispositions). However, if there is a challenge to the validity of the will so as to raise a real doubt as to capacity, or if there is evidence of insanity at any time prior to the execution of the will, the evidential burden will shift to the person propounding the will to prove that the testator was of sound disposing mind at the time when he made his will (see Hughes v Pritchard at [64]). The standard of proof is the balance of probabilities. Although expert evidence may be of assistance, the issue as to testamentary capacity is a decision for the court.*

[159] *The doubt as to capacity must be 'real' and supported by evidence demonstrating a real possibility or probability that the testator lacked capacity. This must relate to the deceased's cognitive abilities.* (Emphasis added.)

[39] We are of the following view regarding testamentary capacity:

(1) testamentary capacity is different from a person's 'soundness of mind' to enter into a contract ('contractual capacity') under ss 11 and 12(1) to (3) of the Contracts Act 1950 ('the CA') — *Chin Jhin Thien*, at para [62]. Reproduced below are ss 11 and 12 of the CA:

> s 11 *Who are competent to contract*
>
> *Every person is competent to contract* who is of the age of majority according to the law to which he is subject, and *who is of sound mind*, and is not disqualified from contracting by any law to which he is subject.
>
> s 12 *What is a sound mind for the purposes of contracting*
>
> (1) *A person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests.*
>
> (2) *A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind.*
>
> (3) *A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.* (Emphasis added.)

(2) the test to determine testamentary capacity by Cockburn CJ in the then UK's Court of Queen's Bench in *Banks v Goodfellow* (1870) LR 5 QB 549 ('testamentary capacity test (*Banks*)'), had been adopted by our Federal Court in:

(a) *Gan Yook Chin*, at para [16]; and

(b) *Chin Jhin Thien*, at paras [53] and [55].

(3) the question that arises is whether the testamentary capacity test (*Banks*) has three or four questions.

According to Asplin LJ in *Hughes*, at para [63], the testamentary capacity test (*Banks*) consists of the following three questions:

(a) was the testator able to understand the nature of the testator's act of making a will and its effect?

(b) was the testator able to understand the extent of the property of which the testator was disposing? and

(c) was the testator able to understand the claims to which the testator ought to give effect?

('three questions (*Banks*' testamentary capacity test)').

In *Leonard*, at paras [153] to [156], Joana Smith J decided that the testamentary capacity test (*Banks*) has a fourth question, namely, whether a 'disorder of the mind' had prevented a testator from making a just and rational disposition of the testator's estate ('four questions (*Banks*' testamentary capacity test)').

The wording of Cockburn CJ's judgment in *Banks*, in our respectful

opinion, supports the four questions (*Banks*' testamentary capacity test).

(4) the testamentary capacity test (*Banks*):

(a) concerns a testator's state of mind and not the testator's physical state:

(i) Banks; and

(ii) the judgment of Isaacs J in the 3–2 majority decision of the High Court of Australia (its apex court) in *Bailey v Bailey* (1924) 34 CLR 558 (Isaacs' majority judgment (*Bailey*)'). Isaacs' majority judgment (*Bailey*) had been adopted in *Gan Yook Chin*, at para [19].

(b) concerns a testator's capacity to understand and not the testator's ability to remember or recall — *Hughes*, at paras [98] and [99]; and

(c) should be applied in relation to the particular transaction, its nature and complexity:

(i) Peter Gibson LJ's judgment in *Hoff*, at para [35]; and

(ii) *Hughes*, at para [103].

(5) in *Tho Yow Pew*, the Court of Appeal had decided that a 'very slight testamentary capacity is required for the making of a will'. With respect, our Federal Court in *Gan Yook Chin* and *Chin Jhin Thien* had approved the testamentary capacity test (*Banks*). From the view point of the stare decisis doctrine, all courts in this country (other than the Federal Court) are bound to follow the Federal Court's judgments in *Gan Yook Chin* and *Chin Jhin Thien* (which adopted the testamentary capacity test (*Banks*)), until and unless the Federal Court subsequently overrules these two cases;

(6) a testator's mental illness, in itself, does not prove a lack of testamentary capacity, unless the illness had affected the testator's mental faculties at the time of the making of the will by the testator — *Chin Jhin Thien*, at paras [64] and [76];

(7) there should be proof of a testator's testamentary capacity at the time when the testator executes the will — *Gan Yook Chin*, at paras [18]. Hence, the importance of the evidence of witnesses who attested to the testator's execution of the will ('attesting witnesses').

Section 5(1) and (2) of the WA require at least two attesting witnesses. With regard to the testimonies of attesting witnesses:

(a) according to Isaacs' majority judgment (*Bailey*) (adopted in *Gan Yook Chin*, at para [19]), 'the court must judge from the facts [the attesting witnesses] state and not from their opinions'; and

(b) if one of the attesting witnesses was an experienced and independent A&S who had drafted the will ('attesting A&S') and the contents of the will appeared to be rational, there is no rebuttable presumption, let alone a 'very strong' rebuttable presumption, that the testator had testamentary capacity — *Hughes*, at paras [75], [79] and [80].

Ashkettle, Re; Ashkettle and another v Gwinnett [2013] EWHC 2125 (Ch); [2013] WTLR 1331, at para [43], Christopher Pymont QC (sitting as a deputy High Court judge) decided that the evidence of an attesting solicitor regarding a testator's testamentary capacity 'must be shown to be based on a proper assessment and accurate information or it is worthless'.

As explained in Isaacs' majority judgment (*Bailey*) and *Ashkettle*, the testimonies of the attesting witnesses (including an attesting A&S) are material and the court should scrutinise the 'facts' and not the 'opinions' of their evidence. Hence, the need for the credibility of the attesting witnesses (or the lack of it), to be determined by the court.

(8) if the evidence of the attesting witnesses is credible, the evidence of witnesses other than the attesting witnesses ('other witnesses'), carries 'little weight' — Isaacs' majority judgment (*Bailey*) *Bailey* (adopted in *Gan Yook Chin*, at para [19]);

(9) if the attesting witnesses (including an attesting A&S) are not credible:

(a) the court may consider the testimonies of the other witnesses; and

(b) relevant evidence regarding a testator's testamentary capacity in respect of events which were prior to and subsequent to the execution of the will, may be considered by the court. In this regard, we rely on the following judgment of Peter Gibson LJ in *Hoff*, at [34].

(10) if there is a 'real doubt' regarding a testator's testamentary capacity, eg, due to the testator's advanced age, dementia or mental health problem ('real doubt (testamentary capacity)'), the golden rule (*Simpson*'s case) states that the will should be attested to by a medical practitioner ('attesting Dr') who:

(a) has examined the testator ('attesting Dr's examination (testator)');

(b) is satisfied regarding the testator's testamentary capacity; and

(c) makes a record of the attesting Dr's examination (testator). In this digital age, an audio-visual recording of the attesting Dr's examination (testator) in real time, can be easily accomplished by way of a mobile phone.

If there exists the real doubt (testamentary capacity), an application of the golden rule (*Simpson*'s case) testamentary capacity may:

(i) prevent an injustice;
(ii) put to rest any allegation regarding:

(ii)(a) the lack of the testator's testamentary capacity; and/or

(ii)(b) the existence of suspicious circumstances and/or undue influence; and

(iii) prevent any unnecessary, costly and/or lengthy litigation regarding any challenge to the validity of the will.

(11) according to *Chin Jhin Thien*, at paras [69] to [71], the golden rule (*Simpson*'s case) is not a rule of case law but only a rule of prudence and good practice for guidance (so as to avoid injustice, costly and protracted litigation); and

(12) whether there was proof of testamentary capacity in a particular case is a question of fact — *Gan Yook Chin*, at para[16]. As such, cases on the existence of testamentary capacity or otherwise, can be explained on their own peculiar facts and do not constitute binding legal precedents from the view point of the doctrine of stare decisis.

F(2). Suspicious circumstances

[40] The Court of Appeal decided in *Tho Yow Pew*, at p 96, as follows:

> *It is clear from the foregoing passages, in particular from the passages in Theobald on wills that suspicious circumstances in the context of wills relate to circumstances surrounding the making of the will, not circumstances surrounding the testamentary capacity of the testator. In other words if the propounder of a will wishes to succeed in obtaining probate, he must upon challenge being taken establish: (a) testamentary capacity; and (b) dispel any suspicious circumstances surrounding the making of the will.* (Emphasis added.)

[41] With regard to suspicious circumstances, we rely on the following two cases from UK:

(1) in *Hoff*:

(a) Peter Gibson LJ, at para [50], gave the following judgment:

> [50] *As is shown by this court's examination in Fuller v Strum* [2002] 1 WLR 1087 *of the question of knowledge and approval in a case where a beneficiary under a will has been involved in the preparation of the will, it is relevant to consider the degree of suspicion aroused by the circumstances of the case, including the dispositions in the will. On the facts of this case, that degree of suspicion is low and has been dispelled.* (Emphasis added.)

(b) according to Chadwick LJ, at paras [62] to [64]:

> [62] *That submission, as it seems to me, betrays a failure to appreciate that the requirements of testamentary capacity and knowledge and approval are*

conceptually distinct. A finding of capacity to understand is, of course, a prerequisite to a finding of knowledge and approval. A testator cannot be said to know and approve the contents of his will unless he is able to, and does, understand what he is doing and its effect. It is not enough that he knows what is written in the document which he signs.

But if testamentary capacity — the ability to understand what is being done and its effect — is established, then it is open to the court to infer that a testator who does know what is written in the document which he signs does, in fact, understand what he is doing. And, where there is nothing to excite suspicion, the court may infer (without more) that a testator who signs a document as his will does know its contents. It would be surprising if he did not.

[63] *Whether those are inferences which should be drawn depends, of course, on the facts of the particular case. The fact that a beneficiary has been concerned in the instructions for, and preparation of, the will excites suspicion that the testator may not know the contents of the document which he signs — or may not know the whole of those contents. The degree of suspicion — and the evidence needed to dispel that suspicion — were considered by this Court in Fuller v Strum* [2001] EWCA 1879, *paragraphs [32]-[36], [73], [77], [2002] 1 WLR 1097, 1107C-1109A, 1122A-C, 1122G-1123C.*

[64] *Further, it may well be that where there is evidence of a failing mind — and, a fortiori, where evidence of a failing mind is coupled with the fact that the beneficiary has been concerned in the instructions for the will — the court will require more than proof that the testator knew the contents of the document which he signed. If the court is to be satisfied that the testator did know and approve the contents of his will — that is to say, that he did understand what he was doing and its effect — it may require evidence that the effect of the document was explained, that the testator did know the extent of his property and that he did comprehend and appreciate the claims on his bounty to which he ought to give effect. But that is not because the court has doubts as to the testator's capacity to make a will. It is because the court accepts that the testator was able to understand what he was doing and its effect at the time when he signed the document, but needs to be satisfied that he did, in fact, know and approve the contents — in the wider sense to which I have referred.* (Emphasis added.)

(2) it is decided in *Leonard*, at paras [166] to [169] and [171], as follows:

[166] *It is common ground that the requirement of knowledge and approval of a will is a requirement that the particular will truly represents, on the balance of probability, the testator's testamentary intentions. The onus lies on the propounder of the will, the Defendants in this case (see Fuller v Strum* [2001] EWCA Civ 1879 *at [32], [59] and [70]). Where there is nothing to excite the suspicion of the court, knowledge and approval will be inferred from proof of due execution and testamentary capacity. Where, however, the circumstances are suspicious, the propounder must affirmatively prove knowledge and approval so that the court is satisfied that the will represents the wishes of the testator (see Fuller v Strum at [33]). This is a matter to be approached objectively; it does not involve a value judgment about the justice of the testamentary disposition or the circumstances in which the will was prepared and signed (Fuller v Strum at [34]).*

[167] *For there to be knowledge and approval, it is not enough that the testator knows*

what the words say, he must know and approve the contents of the will in the sense that he understands both 'what he is doing and its effect' (see Hoff v Atherton [2005] WTLR 99, *per Chadwick LJ at [64] and Gill v Woodall* [2010] EWCA Civ 1430, *per Lloyd LJ, at [71]–[72]*).

[168] *In Simon v Byford* [2014] EWCA 280*, at [47], Lewison LJ described the clear distinction between the capacity to make a will and knowledge and approval of the contents of a will in the following terms:*

> *it is knowledge and approval of the actual will that count: not knowledge and approval of other potential dispositions. testamentary capacity includes the ability to make choices, whereas knowledge and approval requires no more than the ability to understand and approve choices that have already been made.*

[169] *Although in the past the courts tended to adopt a two stage approach to issues of knowledge and approval (focussing first on the question of whether there are circumstances to excite suspicion and second, if so, considering whether the propounder of the will has satisfied his burden of proof), that approach was doubted by Lord Neuberger MR in Gill v Woodall at [22] where he adopted the approach summarised by Sachs J in Crerar v Crerar* (1956) 106 LJ 694 *to the effect that the court should:*

> *consider all the relevant evidence available and then, drawing such inferences as it can from the totality of that material, it has to come to a conclusion whether or not those propounding the will have discharged the burden of establishing that the testatrix knew and approved the contents of the document which is put forward as a valid testamentary disposition.*

...

[171] *This forms the basis for Lewison LJ's formulation of the correct approach in Simon v Byford at [47] as 'a holistic exercise based on the evaluation of all the evidence both factual and expert'.* (Emphasis added.)

[42] Based on the above two UK cases, we express the following view:

(1) if there is no real doubt regarding a testator's testamentary capacity, the testator's knowledge and approval of the will ('testator's knowledge and approval (will)') may be inferred from the testator's due execution of the will; and

(2) if there is a real doubt regarding a testator's testamentary capacity, the propounder of the will is required to dispel the existence of suspicious circumstances by proving the testator's knowledge and approval (will).

G. LEGAL AND EVIDENTIAL BURDEN

[43] Sections 101 and 102 of the EA provide as follows:

s 101 *Burden of proof*

(1) *Whoever desires any court to give judgment as to any legal right or liability,*

dependent on the existence of facts which he asserts, must prove that those facts exist.

(2) *When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.*

s 102 *On whom burden of proof lies*

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. (Emphasis added.)

[44] The distinction between the legal burden under s 101(1) and (2) of the EA ('legal burden') and evidential burden pursuant to s 102 of the EA ('evidential burden') had been explained by the High Court in *Lilies Suraya Abdul Latib v Khairul Sabri* [2020] 4 AMR 365, at para [17], as follows (in the context of a claim based on the tort of negligence):

[17] *I am of the following view:*

(1) *the plaintiffs have the legal burden under s 101(1) and (2) of the EA to prove on a balance of probabilities that the defendants are negligent regarding the incident (legal burden). This legal burden rests on the plaintiffs throughout the trial and does not shift to the defendants at any time — please refer to Letchumanan Chettiar Alagappan*;

(2) *the evidential burden pursuant to s 102 of the EA (evidential burden) lies on the plaintiffs to adduce evidence to prove a prima facie case of the defendants' negligence with regard to the Incident (prima facie case). Regarding this evidential burden:*

(a) *in the Singapore Court of Appeal case of Britestone Pte Ltd v Smith & Associates Far East Ltd* [2007] 4 SLR 855, *at [60], VK Rajah JCA held that a prima facie case may be established by a plaintiff adducing evidence which is not 'inherently incredible'; and*

(b) *once the plaintiffs have proven a prima facie case, the evidential burden shifts to the defendants to adduce rebuttal evidence that the defendants have not been negligent in respect of the incident; and*

(3) *after a trial:*

(a) *the court has to decide whether there is evidence on a balance of probabilities to prove the Defendants' negligence in the Incident. I refer to the definitions of 'proved' and 'disproved' in s 3 of the EA as follows:*

'proved': a fact is said to be 'proved' when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists;

'disproved': a fact is said to be 'disproved' when, after considering the matters before it, the court either believes that it does not exist or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist; (Emphasis added.)

A (b) *if the plaintiffs have adduced sufficient evidence on a balance of probabilities to prove that the defendants have been negligent regarding the incident, the plaintiffs have successfully discharged the legal burden and evidential burden under s 101 and 102 of the EA respectively to prove their claim against the defendants; and*

B (c) *if there is no adequate evidence to prove on a balance of probabilities that the defendants have been negligent in the incident, the plaintiffs have failed to discharge the legal burden and evidential burden. Consequently, the original action has to be dismissed on this ground alone.* (Emphasis added.)

C **[45]** Section 34 of the Probate and Administration Act 1959 ('the PAA') states as follows:

s 34 *Revocation of grant*

D *Any probate* or letters of administration *may be revoked* or amended *for any sufficient cause*. (Emphasis added.)

The following two Federal Court cases have decided that if a will had been admitted to probate and a party subsequently applies to court to revoke the E probate ('applicant (revocation of probate)'), the legal burden to revoke the probate pursuant to s 34 of the PAA lies with the applicant (revocation of probate):

(1) the judgment of Jeffrey Tan Kok Wha FCJ in *Ong Eng Hock & Anor v Ong Cheng Guan & Anor* [2018] 5 MLJ 701, at paras [13] to [16], [20] F and [21]; and

(2) *Chin Jhin Thien*, at para [81].

G **[46]** If a will has not been admitted to probate and there is a challenge by a party regarding the validity of the will ('challenger'):

(1) the propounder of the will ('propounder') has the legal burden to prove on a balance of probabilities that:

H (a) the testator had testamentary capacity to sign the will — *Gan Yook Chin*, at para [19]; and

(b) no suspicious circumstances existed — *Gan Yook Chin*, at para [19],

('propounder's legal burden').

I (2) the propounder's legal burden rests on the propounder throughout the trial and does not shift to the challenger at any time;

(3) the propounder has the initial evidential burden to adduce evidence at the trial which can prove a prima facie case that:

(a) the testator had testamentary capacity to sign the will; and

(b) there were no suspicious circumstances ('prima facie case').

(4) if the propounder can prove a prima facie case, the evidential burden shifts from the propounder to the challenger to adduce evidence that:

(a) the testator had no testamentary capacity; and/or

(b) there existed suspicious circumstances.

(5) after a trial, the court has to decide whether the propounder has discharged both the legal and evidential burden on a balance of probabilities.

[47] With regard to undue influence, the challenger has the legal and evidential burden to prove undue influence on a balance of probabilities — *Gan Yook Chin*, at para [19].

H. SHOULD THERE BE APPELLATE INTERVENTION REGARDING THE HIGH COURT'S FACTUAL FINDING (SD1 W AS A CREDIBLE WITNESS)?

[48] It is axiomatic that an appellate court does not have the audio-visual advantage enjoyed by a trial judge to listen to the oral testimonies of witnesses and assess their demeanour. Hence, there is a very limited scope for appellate intervention regarding a trial court's finding of fact on the credibility of a witness. We rely on the following two cases:

(1) in the Federal Court case of *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67, at para [78], Zabariah Yusof FCJ had explained that an appellate panel can only set aside a trial court's factual finding which is a 'plain' factual error as understood in the following two cumulative circumstances:

(a) the trial court's finding of fact cannot be reasonably explained or justified; and

(b) no reasonable trial judge could have arrived at the factual finding.

(2) the judgment of Andrew Phang Boon Leong JA in the Court of Appeal of Singapore (its highest court) in *Ernest Ferdinand Perez De La Sala v Compañia De Navegación Palomar, SA and others and other appeals* [2018] 1 SLR 894, at para [131], as follows:

> [131] *Aside from arguing that the Judge should have been more focused on the objective evidence, Ernest also challenges the Judge's findings regarding witness credibility. This is an opportune moment to reiterate that the threshold for appellate intervention is a high*

one, and the appellate court 'should be slow to overturn the trial judge's findings of fact, especially where they hinge on the trial judge's assessment of the credibility and veracity of witnesses': see the Singapore High Court decision of Yap Giau Beng Terence v PP [1998] 2 SLR(R) 855 *at [24]. As VK Rajah JA held in the Singapore High Court decision of Sakthivel Punithavathi v PP* [2007] 2 SLR(R) 983 *at [68], appellate intervention concerning, specifically, assessments of witness credibility is justified in the following situations (among others):*

(a) *cases where the primary judge's conclusion, although expressed in terms of credibility was 'plainly wrong' as demonstrated by incontrovertible facts or uncontested testimony;*

...

(d) where the circumstances in which evidence was given, relevant to credibility, were unsatisfactory;

...

(f) where the credibility determination leaves untouched other evidence which requires separate evaluation with no obstacle of a credibility finding; and

(g) where, notwithstanding the credibility finding, the 'extreme and overwhelming pressure' of the rest of the evidence at the trial is such as to render the conclusion expressed at first instance so 'glaringly improbable' or 'contrary to compelling inferences' of the case that it justifies and authorises appellate disturbance of the conclusion reached at trial and the judgment giving it effect. (Emphasis added.)

[49] Due to the following evidence and reasons, we are of the view that the High Court's factual finding (SD1 was a credible witness) was 'plainly erroneous' (in the sense explained by the two appellate cases cited in the above para 48):

(1) the contents (will) were detailed as follows:

(a) cl 1 appointed the first appellant and first respondent as co-executors and co-trustees of the will;

(b) cll 3 to 8 had provided for a distribution of the deceased's interest in immovable properties;

(c) the deceased's shares in four businesses were distributed in accordance with cll 9(1) to (4); and

(d) cl 10(1) provided for the distribution of the deceased's shares in KSTP;

(e) in cl 11(i) to (viii), the deceased bequeathed RM10,000 to each of his eight daughters;

(f) according to cl 12:

(i) the balance sum of money standing to the credit of the deceased at the time of his death, in his current accounts, savings accounts and

fixed deposit accounts in banks and financial institutions; and

(ii) all the shares of the deceased in the stock market,
– would be given to KSTP.

(g) cl 13 stated that all the deceased's properties which was not specifically disposed of in the will, would be given to KSTP (cl 13 (will)').

SD1 testified that in the deceased's home in April 2014, SD1's record (deceased's oral instructions (will)) had been made. SD1's record (deceased's oral instructions (will)) constituted material evidence in this case because, without SD1's record (deceased's oral instructions (will)), SD1 or for that matter, any reasonably competent A&S, could not have been able to draft the detailed will in the first place.

Before the execution of the will by the deceased, SD1 had 38 years of experience as an A&S. As such, SD1 could not claim ignorance regarding the importance of SD1's record (deceased's oral instructions (will)). Yet, SD1 did not produce SD1's record (deceased's oral instructions) as evidence at the trial. Such an omission should attract an adverse inference against SD1 under s 114(g) of the EA — please refer to the Supreme Court's judgment delivered by Mohd Azmi SCJ in *Munusamy v Public Prosecutor* [1987] 1 MLJ 492, at p 494;

(2) during cross-examination, SD1 testified that, among others:

(a) a few days after SD1's receipt of the deceased's oral instructions (will), SD1 met up with the deceased at the deceased's home with a draft copy of the will ('draft (will)');

(b) SD1 read and explained the contents of the draft (will) to the deceased; and

(c) the deceased approved the draft (will) without any amendment.

Notwithstanding the above evidence by SD1 during cross-examination regarding the deceased's alleged approval of the draft (will), SD1 resiled from such testimony during re-examination and SD1 stated that SD1 did not meet the deceased for the deceased's approval of the draft (will);

(3) the cold hard print of the notes of evidence ('NOE') regarding SD1's testimony during SD1's cross-examination and re-examination, showed that SD1 could not remember many relevant matters regarding SD1's own role in respect of the will;

(4) the learned High Court judge had admonished SD1 on 24 November 2021 (during SD1's cross-examination) as follows:

> *MKG [appellants' learned counsel]: Ok. Alright so do you have any knowledge on where the [will] was kept.*
>
> *SD1*: *Was kept.*
>
> *MKG*: *By the [deceased].*
>
> *SD1*: *Mine was kept in office.*
>
> *MKG*: *Sorry?*
>
> *SD1*: *My copy was kept in my office.*
>
> *MKG*: *No, sorry.*
>
> *YA [High Court judge]*: *[SD1], listen to the question carefully. And then you answer and then later on when [MKG] want [sic] to clarify, then you say so many question [sic] and you understand what question is that about. The question was very simple. [MKG] right, the question was where does the [deceased] keep the will? Then why are you answering that you kept your copy in your office? That's nothing of our concern here, [SD1].*
>
> *SD1*: *My apologies, My Lord.*
>
> *YA*: *Answer the question.*
>
> *SD1*: *My apologies.*
>
> *YA*: *If you do it again, I'm going to cite you for contempt. As a legal practitioner you should know everything more than any commoner. [MKG], repeat the question.* (Emphasis added.)

Despite the above admonition of SD1 by the learned High Court judge, the learned High Court judge found as a fact that SD1 was a reliable witness;

(5) on 30 September 2021, during examination-in-chief, SD1 confirmed and signed his witness statement ('WS (SD1)'). The WS (SD1) stated that the deceased signed the will in the deceased's car. However, on the first day of SD1's cross-examination on 30 September 2021, SD1 testified that the deceased executed the will in the deceased's home. We reproduce the relevant part of the NOE as follows:

> *MKG [appellant's counsel]*: *Ok. So the signing [of the will] that you're talking about now, ok, where did this signing happen? This execution, where did it happen?*
>
> *SD1*: *In the house, in the morning.*
>
> *MKG*: *In the house, in the morning.*
>
> *SD1*: *Yes. Somewhere around 11 am. I, yes.*

MKG: *In the Dengkil house [deceased's home]*?

SD1: *Yes*.

MKG: *Ok so your evidence in Court is that [deceased] executed, that means, he's signed, yes*?

SD1: *Yes*.

MKG: *He signed the [will] in the morning about 11 am in the Dengkil house*.

SD1: *Yes*. (Emphasis added.)

On the second day of SD1's cross-examination, 24 November 2021 (after a break of 54 days), SD1 stated that the deceased signed the will in SD1's office. Finally, on 17 January 2022, when SD1 was re-examined by the respondents' then learned counsel, Encik Mohd. Faizal bin Mohd. Aris (not the Respondent's learned counsel for this appeal), SD1 testified that the deceased signed the will in the deceased's car.

The place where the deceased executed the will, was clearly material evidence in this case. Yet, SD1, an experienced A&S, changed his sworn evidence, not once but thrice, with regard to the place where the deceased signed the will; and

(6) despite the fact that SD1 had 38 years of experience as an A&S, SD1 did not send any letter to the deceased to confirm in writing that:

(a) the deceased had instructed SD1 to prepare the will; and

(b) SD1 and SD2 had attested to the execution of the will by the deceased.

In view of the above evidence and reasons, the fact that SD1 was the deceased's nephew and SD1 had been the deceased's personal lawyer for more than 30 years, could not have salvaged SD1's lack of credibility in this case.

Finally, as explained in *Hughes*, at paras [75], [79] and [80], there is no rebuttable presumption that the deceased had testamentary capacity if one of the attesting witnesses was an experienced and independent A&S (such as SD1 in this case).

I. WAS SD2'S EVIDENCE MATERIAL IN THIS CASE?

[50] The learned trial judge made a finding of fact that SD2 was a credible witness. We are of the view that the High Court should have first decided on the question of whether SD2's evidence was material in this case or otherwise. Undoubtedly, SD2's testimony was relevant regarding SD2's attestation to the execution of the will by the deceased. Having said that, we decide that:

(1) SD2's evidence did not support the appellants' contentions regarding:

(a) the deceased's testamentary capacity; and

(b) the non-existence of:

(i) suspicious circumstances; and

(ii) undue influence, manipulation, control and/or domination of the deceased by the respondents.

(2) SD2's testimony could not repair SD2's lack of credibility (please refer to the above para 49) because:

(a) SD2 was not present when the deceased purportedly gave oral instructions in the deceased's home for SD1 to draft the will (in April 2014);

(b) SD2 did not talk to the deceased when the deceased signed the will; and

(c) SD2 had no communication with the deceased before and after the execution of the will by the deceased.

J. WAS THE HIGH COURT'S FACTUAL FINDING (DECEASED'S TESTAMENTARY CAPACITY) PLAINLY ERRONEOUS?

[51] We are mindful that the contents (will) were rational on the face of the will and had been prepared by SD1, a senior and experienced A&S. Nonetheless, the following evidence and reasons show that at the time the deceased signed the will on 10 May 2014, there was a real doubt regarding the deceased's testamentary capacity:

(1) SP2 had testified regarding the deceased's forgetfulness (18 February 2012). It is to be noted that:

(a) SP2 was the deceased's personal physician for more than 17 years; and

(b) SP2 is an independent professional medical specialist who has no financial interest in the outcome of this case.

(2) the following evidence from the appellants proved that at the end of 2010, when the deceased was 93 years old, the deceased had begun to become senile:

(a) the deceased could not recognise his own children, his children's spouses and grandchildren;

(b) the deceased did not know and could not understand what was happening around him;

(c) the deceased was forgetful and could not even remember recent events, including his last meal;

(d) the deceased was repetitive in his conversations;

(e) notwithstanding the fact that the deceased had been repeatedly informed that Hoe Hing (deceased's cousin) and Mr Kong Kim Ping (deceased's brother) had already passed away, the deceased kept on asking about these two persons; and

(f) the deceased could not answer questions posed to him;

(3) when the deceased signed the will, the deceased was at an extremely old age of 97 years old; and

(4) SD1 testified during cross-examination that:

(a) the deceased was 'quite forgetful' when SD1 met the deceased; and

(b) SD1 had to repeat questions to the deceased,

('real doubt (deceased's testamentary capacity)').

In view of the real doubt (deceased's testamentary capacity), the golden rule (Simpson's case) should have been followed with regard to the will, namely, there should have been an attesting Dr who:

(i) examined the deceased ('attesting Dr's examination (deceased)');

(ii) was satisfied regarding the deceased's testamentary capacity; and

(iii) made a record of the attesting Dr's examination (deceased).

[52] We have no hesitation to decide that the High Court's factual finding (deceased's testamentary capacity) is plainly wrong. Our reasons are as follows:

(1) as explained in the above para 49, SD1 was not a reliable witness;

(2) SD2's testimony could not support the High Court's factual finding (deceased's testamentary capacity) — please refer to the above para 50;

(3) in view of the existence of a real doubt (deceased's testamentary capacity) as stated in the above para 51, the golden rule (*Simpson*'s case) should have been followed in this case;

(4) SD1 admitted during cross-examination that SD1 did not ask the deceased any question to test his testamentary capacity (before the deceased signed the will);

(5) as explained in the above sub-paras 49(1)(a) to (g), the will was a detailed one. According to Peter Gibson LJ in *Hoff*, at para [35], the court should consider the 'nature and complexity' of the will in deciding whether there exists testamentary capacity or not. In view of the complex nature of the contents (will), neither SD1 nor SD2 could prove the existence of the deceased's testamentary capacity in this case; and

(6) as the testimonies of the two attesting witnesses to the will in this case (ie, SD1 and SD2) could not prove the deceased's testamentary capacity (please refer to the above paras 49 and 50), the court can consider events which occurred prior to and subsequent to the execution of the will by the deceased — please see the judgment of Peter Gibson LJ in *Hoff*, at para [34]. The following events clearly support an inference that the deceased had no testamentary capacity to execute the will:

(a) the four video recordings and the transcripts (four video recordings) constituted compelling evidence regarding the lack of testamentary capacity on the part of the deceased;

(b) the conduct of a party is relevant under s 8(2) of the EA. Section 8(2) of the EA provides as follows:

> *The conduct of any party*, or of any agent to any party, *to any suit or proceeding in reference to that suit or proceeding, or in reference to any fact in issue therein or relevant thereto*, and the conduct of any person an offence against whom is the subject of any proceeding, *is relevant if the conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto*. (Emphasis added.)

The following conduct by the respondents clearly proved their active concealment of the deceased's lack of testamentary capacity:

(i) without informing the appellants and without any cogent reason, the respondents:

(i)(a) discontinued the deceased's consultation with SP2 (who had treated the deceased for more than 17 years); and

(i)(b) brought the deceased to consult Dr Lim.

Dr Lim examined the deceased for a total of 11 times (from 18 March 2016 to 19 January 2017) and yet, the respondents did not call Dr Lim to give expert evidence in this case regarding the deceased's testamentary capacity or otherwise. Worse still, no evidence had been adduced by the respondents on why the respondents could not have applied for a court subpoena to compel Dr Lim to testify in this case. Accordingly, it is only just for us to invoke an adverse inference under s 114(g) of the EA against the respondents for their suppression of Dr Lim's material evidence regarding the deceased's testamentary capacity or otherwise.

(ii) the respondents could have easily taken the deceased for a

consultation with a geriatrics of their choice. On the contrary, the respondents prevented the appellants from bringing the deceased to consult a geriatrics as follows:

(ii)(a) the respondents' conduct (deceased's early discharge from Gleneagles Ampang Hospital, December, 2015) — please refer to the above para 18. In December 2015, the deceased was already warded in Gleneagles Ampang Hospital and could have easily consulted the geriatrics (based in Gleneagles Ampang Hospital) but were prevented from doing so by the respondents;

(ii)(b) the conduct of the first and second respondents (prevention of geriatrics' examination of deceased (13 January 2016)) — please see the above para 19; and

(ii)(c) the conduct of the first and second respondents (prevention of geriatrics' examination of deceased (18 July 2016)) — please refer to the above para 20.

(c) prior to the incorporation of KSTP, the deceased personally handled his own business affairs. If the deceased had the testamentary capacity to execute the will, there would not be any reason or necessity for the respondents to incorporate KSTP (to manage the deceased's assets and businesses).

[53] We have not overlooked the following evidence:

(1) two days before the deceased signed the will on 10 May 2014, the deceased executed the SPA (land);

(2) the deceased signed the MOT (land) on 12 May 2014, two days after his execution of the will;

(3) on behalf of the deceased, SD1's two demands (2015) had been issued;

(4) with regard to KSTP:

(a) the deceased oversaw the project (KSTP);

(b) the deceased appointed the contractors (KSTP project);

(c) the deceased liaised with the contractors (KSTP project) with regard to the progress payment claims by the contractors (KSTP project);

(d) SD7, a director of NKC, one of the contractors (KSTP project), gave evidence that he received instruction from the deceased regarding the KSTP Project;

(e) the deceased signed cheques for KSTP;

(f) the deceased held meetings with the contractors (KSTP project),

KSTP's banker and solicitor; and

(g) the deceased chaired KSTP's EGM (9 January 2017).

(5) the deceased celebrated his birthday on 31 May 2015;

(6) the deceased's two disclaimer letters (SLSM, 12 July 2015)) were sent;

(7) the deceased's PA (14 August 2015) had been executed; and

(8) SD5 testified that he had translated an affidavit (not related to this case) in Hokkien to the deceased in 2016,

('respondents' evidence').

With regard to the respondents' evidence:

(i) there was no challenge to the contractual capacity of the deceased to sign the SPA (land), MOT (land) and deceased's PA (14 August 2015); and

(ii) the respondents' evidence, in our view, cannot displace the evidence and reasons:

(ii)(a) regarding the real doubt (deceased's testamentary capacity) and the need for an adoption of the golden rule (*Simpson*'s case) in this case — please refer to the above sub-paras 51(1) to (3); and

(ii)(b) the evidence and reasons explained in the above sub-paras 52(1) to (6), proved on a balance of probabilities the lack of the deceased's testamentary capacity in this case.

[54] Additionally or alternatively, premised on the evidence and reasons explained in the above sub-paras 51(1) to (3) and 52(1) to (6), we have no hesitation to decide that the respondents had failed to discharge the legal burden and evidential burden to prove on a balance of probabilities that the deceased had the testamentary capacity to sign the will.

K. SHOULD THERE BE APPELLATE INTERVENTION FOR THE HIGH COURT'S FACTUAL FINDING (NO SUSPICIOUS CIRCUMSTANCES REGARDING THE MAKING OF THE WILL)?

[55] We are of the view that the High Court's factual finding (no suspicious circumstances regarding the making of the will) was plainly wrong. Our reasons are as follows:

(1) in comparison to the appellants, the will had favoured substantially the respondents. Hence, the respondents had a financial motive within the meaning of s 8(1) of the EA to maintain the validity of the will ('respondents' financial motive'). We reproduce below s 8(1) of the EA:

s 8(1) *Any fact is relevant which shows or constitutes a motive* or preparation *for any fact*

in issue or relevant fact. (Emphasis added.)

The respondents' financial motive raised a strong suspicion in this case regarding the validity of the will;

(2) the first respondent (not the deceased) called SD1 to come to the deceased's home because according to the first respondent, the deceased wished to make a will. It is thus clear that the first respondent was involved in the preparation of the will from the very beginning. This gives rise to a suspicion in respect of the legality of the will — please refer to the judgments of Peter Gibson and Chadwick LJJ in *Hoff* (reproduced in the above sub-para 41(1));

(3) in April 2014, the first respondent was present in the deceased's home when the deceased allegedly gave instructions for SD1 to prepare the will. More suspiciously, the first respondent handed the bundle (documents) to SD1 (for the preparation of the will). The bundle (documents) contained the following documents:

(a) photocopies of titles of land which were owned by the deceased;

(b) photocopies of certificates of shares owned by the deceased; and

(c) photocopies of identity cards of the deceased's beneficiaries of the will.

It is to be noted that when the first respondent handed the bundle (documents) to SD1, the deceased was illiterate and wheelchair-bound. In those circumstances:

(i) the deceased could not understand the contents of the bundle (documents) without any translation and explanation by a person who is literate in English and Malay. No evidence had been adduced by the respondents regarding:

(ii)(a) who had translated and explained the contents of the bundle (documents) to the deceased; and

(ii)(b) whether the deceased had understood and agreed to the contents of the bundle (documents); and

(ii) could not have physically prepared and collated the bundle (documents).

(4) as explained in the above sub-para 49(1), in view of the complex nature of the contents (will), SD1's record (deceased's oral instructions (will)) constituted material evidence in this case. Yet, SD1's record (deceased's oral instructions (will)) was not adduced as evidence at the trial. The absence of SD1's record (deceased's oral instructions (will)) in this case, triggered a strong suspicion that the will was not valid;

(5) both the bundle (documents) and will excluded the following three assets of the deceased ('three assets'):

(a) the interest of the deceased in Perniagaan Plus One car care (business partnership);

(b) the deceased's interest in Siew Tong Enterprise (business partnership); and

(c) a Mercedes Benz car with the Registration No NQ7.

The learned High Court judge accepted the submission by the respondents' learned counsel that cl 13 (will), as a 'residuary clause', would apply to the three assets. However, the fact that both the bundle (documents) and will had omitted the three assets, aroused a suspicion that the will was not valid because:

(i) the will was a detailed one (please refer to the above sub-paras 49(1)(a) to (g)); and

(ii) previously, the deceased was a successful businessman. If the deceased had possessed testamentary capacity, it would have been inconceivable for the deceased to have omitted the three assets in the bundle (documents) and will.

(6) on 10 May 2014, the first respondent drove the deceased to SD1's office. The second respondent accompanied the deceased in the car. The presence of the first and second respondents at the time when:

(a) SD1 allegedly read and explained the will to the deceased; and

(b) the deceased signed the will,

– would raise a suspicion that the will was not valid.

(7) SD1 admitted during cross-examination that SD1 did not record anywhere that:

(a) SD1 had read and explained the contents (will) to the deceased; and

(b) the deceased understood SD1's explanation of the contents (will).

(8) after the execution of the will by the deceased:

(a) SD1 handed the will to the first respondent; and

(b) the deceased was not given a copy of the will by the first respondent.

The deceased had a right to revoke the will or amend the will by way of a codicil ('deceased's right (revocation (will)/codicil)'). Without a copy of the will, the deceased's right (revocation (will)/codicil) became illusory; and

(9) the following conduct by the second respondent ensured that the deceased's right (revocation (will)/codicil) could not be exercised at all:

(a) the will was kept in the safe box (will);

(b) only the second respondent kept the key (safe box (will)); and

(c) the second respondent erected the grill gate (room (safe boxes)).

[56] In any event, premised on the evidence and reasons stated in the above sub-paras 55(1) to (9), we decide that the respondents had not discharged their legal burden and evidential burden to dispel the existence of suspicious circumstances in this case.

[57] As explained in *Hoff* and *Leonard* (please refer to the above para 41), when there is a real doubt regarding a testator's testamentary capacity, there should be proof of the testator's knowledge and approval (will) before the court can uphold the validity of the will in question.

[58] As explained in the above sub-paras 51(1) to (3) and 52(1) to (6), there was no proof of the deceased's testamentary capacity on a balance of probabilities. Consequently, the respondents had to prove in this case that deceased knew and approved the contents of the will. No such proof had been adduced by the respondents in this case.

L. WAS THE HIGH COURT'S FACTUAL FINDING (NO UNDUE INFLUENCE/MANIPULATION/CONTROL/DOMINATION OF THE DECEASED) PLAINLY WRONG?

[59] With respect to the learned trial judge, the following evidence and reasons show that the High Court's factual finding (no undue influence/manipulation/control/domination of the deceased) was plainly erroneous:

(1) since 2009 (when the deceased was 92 years old), the deceased was wheelchair-bound. The second respondent took care of the deceased, first in the deceased's home and later in the third respondent's home. The first respondent even replaced the fourth appellant as the deceased's driver;

(2) without any reason, the respondents discontinued the deceased's consultation with SP2 (the personal physician for the deceased for more than 17 years) and brought the deceased to consult Dr Lim;

(3) the respondents had control of the deceased's business through KSTP;

(4) the respondents were able to prevent the appellants from taking the deceased to consult a geriatrics as follows:

(a) the respondents' conduct (deceased's early discharge from Gleneagles Ampang Hospital, December, 2015);

(b) the conduct of the first and second respondents (prevention of geriatrics' examination of deceased (13 January 2016)); and

(c) the conduct of the first and second respondents (prevention of geriatrics'

examination of deceased (18 July 2016)).

(5) the deceased's right (revocation (will)/codicil) had been deprived when:

(a) the deceased was not given a copy of the will by the first respondent;

(b) the will was kept in the safe box (will) and only the second respondent had the key (safe box (will)); and

(c) the second respondent erected the grill gate (room (safe boxes)).

(6) the respondents surreptitiously took the deceased from the deceased's home to the third respondent's home. Thereafter:

(a) the appellants were not allowed by the respondents to meet the deceased in the third respondent's home. In fact, the third respondent instructed the security guards at the guardhouse (third respondent's home) not to allow the appellants to enter the third respondent's home (so as to visit the deceased). The photographs of the appellants, their car models and car numbers were:

(i) given by the third respondent to the security guards at the third respondent's home; and

(ii) posted at the guardhouse (third respondent's home).

(b) the respondents disallowed the deceased from attending the following family matters:

(i) the wedding of the deceased's eldest great grandson in October 2016;

(ii) the Chinese New Year family reunion dinner in 2017; and

(iii) the funeral of the deceased's granddaughter, Ms Kong Yen Lin, whose last wish was to meet the deceased before she succumbed to cancer.

[60] As explained in the above sub-paras 59(1) to (6), we are constrained to find that the appellants had succeeded to discharge the legal burden and evidential burden to prove on a balance of probabilities that the deceased executed the will under the undue influence, manipulation, control and/or domination of the respondents.

M. DID THE HIGH COURT ERR IN LAW BY DRAWING AN ADVERSE INFERENCE AGAINST THE APPELLANTS W ITH REGARD TO SP1'S EVIDENCE?

[61] For the sake of completeness, we are not able to agree with the learned trial judge's invocation of an adverse inference under s 114(g) of the EA against the appellants for not asking SP1 regarding the deceased's testamentary

capacity. This was because SP1 did not examine the deceased at any time and was not in any position to give an expert opinion on the deceased's testamentary capacity.

As decided by the Supreme Court in *Munusamy*, at p 494, an adverse inference can only be drawn under s 114(g) of the EA against a party for suppressing material evidence. If SP1 could not give any material evidence regarding the deceased's testamentary capacity, the High Court erred in law by drawing an adverse inference under s 114(g) of the EA against the appellants for not asking SP1 regarding the deceased's testamentary capacity.

N. OUTCOME OF THIS APPEAL

[62] Premised on the above evidence and reasons, the following judgment is entered:

(1) this appeal is allowed;

(2) the High Court's decision is set aside;

(3) the following declarations are granted:

  (a) the will is invalid; and

  (b) the deceased had died intestate.

(4) the first appellant and first respondent are appointed to be co-administrators of the estate ('co-administrators');

(5) an order for the co-administrators to distribute the estate in accordance with the distribution Act 1958;

(6) subject to allocatur fee, the respondents shall pay to the first to sixth appellants a sum of RM180,000 as costs for the proceedings in the Court of Appeal and High Court;

(7) a sum of RM100,000 which had been previously paid by the first to sixth appellants to the respondents as costs for proceedings in the High Court with regard to Suit No 494 and Suit No 1019, shall be refunded to the first to sixth appellants by the respondents; and

(8) all parties have liberty to apply to the Court of Appeal regarding:

  (a) the contents of the deceased's safe boxes; and

  (b) the remuneration of the trust co.

A *Appeal allowed; High Court's decision set aside with costs of RM180,000 to be paid by respondents to first to sixth appellants, subject to allocatur fee.*

Reported by Dzulqarnain Ab Fatar

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